No. 91-1521-CSY
Status: GRANTED

Title: United States, Petitioner
v.
Lowell Green

Docketed:
March 20, 1992

Court: District of Columbia
Court of Appeals

Counsel for petitioner: Solicitor General

Counsel for respondent: Conte,Joseph

Time to file ext by CJ to & inc March 24, 1992 CITED

Entry	Date	Note	Proceedings and Orders
1	Feb 11 1992	G	Application (A91-584) to extend the time to file a petition for a writ of certiorari from February 23, 1992 to March 24, 1992, submitted to The Chief Justice.
2	Feb 11 1992		Application (A91-584) granted by the Chief Justice extending the time to file until March 24, 1992.
3	Feb 11 1992		Application for extension of time to file petition and order granting same until March 24, 1992 (Rehnquist, February 11, 1992).
4	Mar 20 1992	G	Petition for writ of certiorari filed.
5	Apr 22 1992		DISTRIBUTED. May 15, 1992
6	Apr 24 1992	X	Brief of respondent Lowell Green in opposition filed.
7	Apr 24 1992	G	Motion of respondent for leave to proceed in forma pauperis filed.
8	May 6 1992	X	Reply brief of petitioner United States filed.
9	May 18 1992		Motion of respondent for leave to proceed in forma pauperis GRANTED.
10	May 18 1992		Petition GRANTED.
			**********
11	May 27 1992	G	Motion of the Solicitor General to dispense with printing the joint appendix filed.
12	Jun 8 1992		Motion of the Solicitor General to dispense with printing the joint appendix GRANTED.
15	Jun 29 1992		Brief amici curiae of Americans for Effectiive Law Enforcement, et al. filed.
13	Jul 1 1992		Brief of petitioner United States filed.
14	Jul 2 1992		Brief amicus curiae of District of Columbia filed.
16	Jul 27 1992		Record filed.
		*	Certified original proceedings District of Columbia Court of Appeals and Superior Court of District of Columbia.
17	Aug 3 1992		Brief amici curiae of Public Defender Service fo the District of Columbia, et al. filed.
18	Aug 3 1992		Brief of respondent Lowell Green filed.
19	Aug 27 1992		Reply brief of petitioner filed.
20	Oct 13 1992		SET FOR ARGUMENT MOMDAY, NOVEMBER 30, 1992. (2ND CASE).
21	Oct 15 1992		CIRCULATED.
22	Nov 30 1992		ARGUED.

(1)

91-1521

No.

In the Supreme Court of the United States

OCTOBER TERM, 1991

UNITED STATES OF AMERICA, PETITIONER

v.

LOWELL GREEN

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

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QUESTION PRESENTED

Whether *Edwards* v. *Arizona*, 451 U.S. 477 (1981), requires the suppression of a voluntary confession because law enforcement officers initiated interrogation of the suspect five months after he invoked his right to counsel in connection with an unrelated offense, where the suspect consulted with counsel and pleaded guilty to the unrelated offense prior to the interrogation.

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In the Supreme Court of the United States

OCTOBER TERM, 1991

No.

UNITED STATES OF AMERICA, PETITIONER

v.

LOWELL GREEN

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

The Solicitor General, on behalf of the United States, respectfully petitions for a writ of certiorari to review the judgment of the District of Columbia Court of Appeals in this case.

OPINION BELOW

The opinion of the District of Columbia Court of Appeals (App., *infra*, 1a-18a) is reported at 592 A.2d 985.

JURISDICTION

The judgment of the court of appeals was entered on May 31, 1991. A petition for rehearing was denied on November 25, 1991. App., *infra*, 34a-35a. On February 11, 1992, the Chief Justice extended the time for filing a petition for a writ of certiorari to and including March 24, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1257.

STATEMENT

1. On July 18, 1989, officers of the District of Columbia Metropolitan Police Department arrested respondent on drug charges. The officers gave respondent a printed advice-of-rights form known as a "PD 47." In response to the printed question whether he was willing to talk to the police without having an attorney present, respondent wrote "No." The officers did not attempt to question him. App., *infra*, 2a.

Respondent appeared in court the following day, and an attorney was appointed to represent him. On July 28, 1989, the drug charges were dismissed at the preliminary hearing. Respondent remained in custody because of an unrelated juvenile matter. App., *infra*, 2a.

In August 1989, respondent was indicted on charges of possessing a controlled substance with intent to distribute it. On September 27, 1989, he entered a plea of guilty to the lesser included offense of attempted possession of a controlled substance with intent to distribute it. App., *infra*, 2a.

Respondent remained in custody awaiting sentencing on the drug charge.[1] On January 4, 1990, a Metropolitan Police Department detective obtained an arrest warrant charging respondent with the unrelated 1988 murder of Cheaver Herriott. The next day, officers brought respondent to the Police Department's

[1] Respondent was held in the Youth Center at Lorton Reformatory while a study was performed to determine his suitability for treatment under the District of Columbia Youth Rehabilitation Amendment Act of 1985. App., *infra*, 2a; see D.C. Code Ann. § 24-803(e) (1989). On February 26, 1990, respondent was sentenced to 15 months' incarceration under the Youth Rehabilitation Act. App., *infra*, 2a.

Homicide Office for booking. The officers advised respondent of his *Miranda* rights, and he agreed to waive those rights. Respondent discussed his involvement in the murder of Herriott with the officers, and they again advised him of his rights. Respondent then made a videotaped statement in which he confessed to his involvement in the robbery and murder. App., *infra*, 3a.

2. Respondent was indicted for murder. He moved to suppress his confession, claiming that it had been obtained in violation of *Edwards* v. *Arizona*, 451 U.S. 477 (1981). The trial court initially denied the motion. App., *infra*, 19a-30a. The court noted that an "extraordinary amount of time" had elapsed between respondent's invocation of his right to counsel and his confession, and that respondent had had an opportunity to consult with counsel during that time. Under these circumstances, the court concluded that "none of the reasons which underlie the [Supreme] Court's decisions which have addressed a criminal defendant's right to counsel under the [Sixth] Amendment and his right not to incriminate himself under the [Fifth] Amendment, would be served by suppression of these statements." App., *infra*, 25a-26a.[2]

Three days after the trial court's initial ruling, this Court decided *Minnick* v. *Mississippi*, 111 S. Ct. 486 (1990). In light of that decision, the trial court reconsidered its ruling and ordered that respondent's confession be suppressed. App., *infra*, 31a-33a.

3. The District of Columbia Court of Appeals affirmed. App., *infra*, 1a-18a. The court acknowledged

[2] The trial court also rejected respondent's contentions that his confession was involuntary, and that it was obtained during an unnecessary delay in bringing him to court. See App., *infra*, 20a-22a, 26a-28a.

that this case differs from *Edwards* and other cases decided by this Court in several ways.

First, the interrogation concerned an unrelated crime and took place after respondent had consulted with a lawyer. App., *infra*, 6a-8a. The court concluded, however, that *Minnick* and *Arizona* v. *Roberson*, 486 U.S. 675 (1988), should not be "narrow[ed] * * * to their individual settings." App., *infra*, 7a.

Second, the court recognized that this case differs from the *Edwards* line of cases because there was a five-month interval between respondent's invocation of the *Edwards* right and the subsequent interrogation. App., *infra*, 8a-12a. Although the court viewed as "substantial" the government's arguments against a "perpetual irrebuttable presumption," App., *infra*, 9a, 11a (quoting *Minnick*, 111 S. Ct. at 496 (Scalia, J., dissenting)), it concluded that "only the Supreme Court can explain whether the *Edwards* rule is time-tethered." App., *infra*, 11a.

Third, the court recognized that, before the interrogation, respondent pleaded guilty to the offense with which he was charged when he invoked the *Edwards* right. App., *infra*, 12a-14a. The court noted (App., *infra*, 12a) that this "might seem to be [the government's] most potent argument" for distinguishing *Edwards*, and that cutting off the irrebuttable presumption of *Edwards* when a defendant pleads guilty "promises adherence to the requirement of some form of bright-line rule." The court nevertheless concluded that a plea of guilty "is consistent with [the defendant's] election to communicate with the police only through counsel," and that therefore the continued application of the prophylactic rule of *Edwards* was necessary in the circumstances of this case. App., *infra*, 14a.

The court observed that "it is not unfair to question the logic of a presumption that renders invalid an otherwise knowing, intelligent and voluntary waiver of *Miranda*'s auxiliary protections—and so demands exclusion of a murder confession voluntary in fact—because over five months earlier, in connection with an unrelated crime, the defendant asked for (and was afforded) the assistance of counsel." App., *infra*, 14a-15a. The court added that, if it had reached the wrong result, "then it is for the [Supreme] Court in this case or some future one to provide the *Leitfaden*—the red thread—through its decisions leading to the correct result." App., *infra*, 15a.[3]

Judge Steadman dissented. App., *infra*, 16a-18a. He reasoned that the irrebuttable presumption of *Edwards* should not continue to apply after a suspect waives his Fifth Amendment right against compulsory self-incrimination and pleads guilty to the offense that prompted the invocation of the *Edwards* right. He noted that a guilty plea represents "a sea change in th[e] circumstances which existed at the time the right to counsel was originally invoked." App., *infra*, 16a. Indeed, a guilty plea "entail[s] a knowing, voluntary, and intelligent waiver of the Fifth Amendment right against self-incrimination and its consequent concerns—the very right that *Edwards* seeks to protect." App., *infra*, 18a.

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[3] The court held (App., *infra*, 3a-4a n.1) that this case presents "no issue of violation of [respondent's] right to counsel under the Sixth Amendment." In addition, the court rejected respondent's contention that the government delayed unnecessarily in bringing him to court. App., *infra*, 4a-5a n.2. In the court of appeals, respondent abandoned the contention that his confession was involuntary. *Ibid.*

The government's petition for rehearing en banc was denied by an equally divided vote. App., *infra*, 34a-35a.

REASONS FOR GRANTING THE PETITION

In *Miranda* v. *Arizona*, 384 U.S. 436 (1966), and subsequent cases, this Court has crafted a set of prophylactic rules to protect the Fifth Amendment privilege in the context of custodial interrogation. The Court has justified creation of each of those rules on the ground that it protects a suspect against inherently coercive pressures of interrogation in a police-dominated setting. When mechanically applied, however, the rules require the suppression of some confessions that were obtained without any hint of coercion or police overreaching, resulting in a large gulf between the rules themselves and the constitutional values that those rules were meant to serve. For such cases, it is essential to the rational operation of the criminal justice system that this growing body of prophylactic rules be limited so that they do not simply result in the gratuitous exclusion of highly probative evidence, without affording any significant protection to the exercise of constitutional rights.

This is such a case. The court of appeals acted under what it understood to be the compulsion of the prophylactic rules of *Miranda*, *Edwards*, *Roberson*, and *Minnick*, although it applied those rules in a context far removed from the facts of each of those four cases. As the court of appeals acknowledged, extending those rules to a case such as this one exacts a high cost, without any clear compensating benefit to legitimate constitutional interests. This Court should grant review to establish that the prophylactic rules governing custodial interrogation need not be applied

in settings where the concerns underlying those rules are not implicated.

1. In *Miranda*, the Court held that before conducting custodial interrogation the police must advise a suspect of his right to remain silent, his right to consult with counsel and have counsel present during any interrogation, his right to have counsel appointed for him if he is indigent, and the consequences of waiving those rights, *i.e.*, that anything the suspect says may be used against him in court. 384 U.S. at 467-473. Those procedures were necessary, the Court concluded, to ensure that the coercive pressures associated with custodial interrogation would not lead suspects to relinquish their privilege against compulsory self-incrimination without understanding the consequences of doing so. *Id.* at 467.

In a series of subsequent cases, the Court has elaborated upon the prophylactic rule established in *Miranda*. Thus, in *Edwards* v. *Arizona*, 451 U.S. 477 (1981), the Court held that once a suspect has expressed his desire to deal with the police only through counsel, he "is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police." *Id.* at 484-485. In *Arizona* v. *Roberson*, 486 U.S. 675 (1988), the Court extended the principle of *Edwards* to interrogations conducted in the course of separate investigations, holding that a suspect's request for counsel bars subsequent police-intitiated custodial interrogation of a suspect on any subject. *Id.* at 683-685. Most recently, in *Minnick* v. *Mississippi*, 111 S. Ct. 486 (1990), the Court concluded that merely permitting a suspect who has requested counsel to consult with his lawyer before the

police conduct further interrogation is not sufficient to satisfy the *Edwards* rule. Instead, the Court held that "when counsel is requested, interrogation must cease, and officials may not reinitiate interrogation without counsel present, whether or not the accused has consulted with his attorney." *Id.* at 491.

This case involves the application, in tandem, of each of the four prophylactic rules set forth above, and in a setting that tests the limits of those rules. Thus, this case presents the question whether the principles of *Miranda*, as applied in *Edwards*, require suppression of a voluntary confession obtained more than five months after a suspect invoked his right to counsel in connection with an unrelated offense, and after the suspect consulted with counsel and pleaded guilty to that offense.

The Court has never held that the *Edwards* rule permanently bars a suspect who invokes the right to the presence of counsel during custodial interrogation from waiving that right at the request of the police. Indeed, it is generally understood that the *Edwards* rule does not apply if there has been a break in the suspect's custody, so that the invocation of counsel during one period of custody does not bar police initiation of questioning if the suspect is released and then taken into custody again on another occasion. See *McNeil* v. *Wisconsin*, 111 S. Ct. 2204, 2208 (1991) (*Edwards* rule applies "assuming there has been no break in custody"); *Dunkins* v. *Thigpen*, 854 F.2d 394, 397 (11th Cir. 1988), cert. denied, 489 U.S. 1059 (1989); *McFadden* v. *Garraghty*, 820 F.2d 654, 661 (4th Cir. 1987); *United States* v. *Skinner*, 667 F.2d 1306, 1309 (9th Cir. 1982), cert. denied, 463 U.S. 1229 (1983).

Because of his involvement in an unrelated juvenile matter and his conviction on the drug charge, respondent was not released from custody between the time of his arrest on the drug charges and his interrogation on the murder charge five months later. The court of appeals felt constrained by this Court's rulings in *Edwards*, *Roberson*, and *Minnick* to hold that respondent's invocation of the *Edwards* right to counsel barred the police from questioning him on any subject for as long as he remained in custody for any reason. The court therefore held that the police violated the principles of *Edwards* when they approached respondent in January 1990 and sought to question him about the murder, even though they advised him of his *Miranda* rights at that time and he willingly agreed to speak with them.

The court of appeals' application of the *Edwards* rule finds some support in the language of the Court's opinions. See, *e.g.*, *McNeil* v. *Wisconsin*, 111 S. Ct. 2204, 2210 n.1 (1991) (suggesting that question in determining whether defendant's request for counsel during a judicial proceeding is invocation of *Edwards* right is "whether such a request implies a desire *never* to undergo custodial interrogation, about anything, without counsel present") (emphasis added). As the courts below recognized, however, the result in this case—the exclusion of a voluntary murder confession simply because the suspect asked for and was furnished counsel months earlier in connection with a separate investigation—is not justified by the Fifth Amendment or the purposes underlying the *Edwards* rule. Review by this Court is needed to make clear that *Edwards* does not impose a permanent, unalterable ban on police-initiated custodial interrogation after a suspect's invocation of his right not to be interrogated in the absence of counsel.

2. Several factors distinguish this case from the Court's previous *Edwards* cases and suggest that the *Edwards* rule should have no application here.

a. First, after respondent invoked the *Edwards* right to counsel—but before he was questioned by the police about the murder—respondent entered a plea of guilty to the drug charge that had prompted his invocation of the *Edwards* right. As the Court has recognized, a guilty plea "represents a break in the chain of events which has preceded it in the criminal process," *Tollett* v. *Henderson*, 411 U.S. 258, 267 (1973), and constitutes a waiver of the Fifth Amendment right not to be compelled to incriminate oneself, *Boykin* v. *Alabama*, 395 U.S. 238, 243 (1969); *McCarthy* v. *United States*, 394 U.S. 459, 466 (1969). For those reasons, a guilty plea so alters the suspect's situation that courts should not continue to give preclusive effect to the suspect's assertion of the *Edwards* right, when that assertion was made at the time of the suspect's initial arrest and prior to the time the suspect consulted with counsel and appeared in court to make a formal admission of his guilt.

b. Second, five months elapsed between respondent's assertion of the *Edwards* right and the initiation of interrogation by the police. The court of appeals' conclusion that the lapse of time in this case did not justify a departure from the "continuing irrebuttable presumption" imposed by *Edwards*, see App., *infra*, 9a-12a, is inconsistent with the purposes underlying that rule. The *Edwards* presumption is "designed to prevent police from badgering a defendant into waiving his previously asserted *Miranda* rights." *McNeil* v. *Wisconsin*, 111 S. Ct. at 2208 (quoting *Michigan* v. *Harvey*, 494 U.S. 344, 350 (1990)). As time passes following a suspect's invocation of the *Edwards* right, the risk that reinitiation of interrogation will be perceived by the suspect as "badgering" diminishes. Where months have passed without any effort by the police to question the suspect, there is no reason to presume that an inquiry by the police into whether the suspect wishes to speak to them without counsel will "wear down the accused and persuade him to incriminate himself notwithstanding his earlier request for counsel's assistance." *Smith* v. *Illinois*, 469 U.S. 91, 98 (1984).

We recognize that consideration of the interval between invocation of the *Edwards* right to counsel and reinitiation of interrogation may undermine the "'clear and unequivocal' character" of the *Edwards* rule to some extent. See *Minnick*, 111 S. Ct. at 492. But the Court has recognized that guidelines for judicial review should be "clear and unequivocal * * * only when they guide sensibly." *McNeil*, 111 S. Ct. at 2211. See also *New York* v. *Quarles*, 467 U.S. 649, 658 (1984) (adopting exigent circumstances exception to *Miranda* even though the exception "to some degree * * * lessen[s] the desirable clarity of that rule"); *Michigan* v. *Mosley*, 423 U.S. 96, 104, 107 (1975) (concluding that police officers "scrupulously honored" the suspect's right to silence when they "suspended questioning entirely for a significant period before beginning the interrogation that led to [Moseley's] incriminating statement"). Because a request to interrogate a suspect on a new subject more than five months after the suspect first invoked his right to counsel does not remotely constitute police "badgering," an absolute prohibition on police-initiated interrogation in this setting does not meaningfully advance the "anti-badgering" purpose for which the *Edwards* rule was designed.

c. Finally, the police initiated interrogation only after respondent had been provided with counsel and had consulted with his lawyer, and the questioning concerned a crime wholly unrelated to the offense that prompted respondent's invocation of the *Edwards* right. Thus, 'this case is unlike either *Arizona* v. *Roberson*, in which the police reinitiated interrogation without honoring the suspect's request for counsel, or *Minnick* v. *Mississippi*, in which the renewed interrogation concerned the same offense that had prompted the suspect's invocation of the *Edwards* right. The fact that counsel was made available to the respondent eliminated the coercive pressure that arises when the police reinitiate interrogation of a suspect who has asked for but not received access to counsel. See *Roberson*, 486 U.S. at 686 & n.6 (discussing coercive effects of refusal to honor request for counsel). And the fact that the interrogation concerned an unrelated offense greatly reduced the possibility that the respondent might be badgered into giving a statement by repeated police-initiated questioning. See *Minnick*, 111 S. Ct. at 491 (discussing "persistent attempts by officials to persuade [defendants] to waive [their] rights").

When a suspect whose prior invocation of the right to counsel has been honored is later approached by the police about a different offense, and is once again given *Miranda* warnings, he will likely understand, not that he is being pestered again by the police, but that he is simply being asked, in the context of the new offense, to make "an *initial* election as to whether he will face the State's officers during questioning with the aid of counsel, or go it alone." *Patterson* v. *Illinois*, 487 U.S. 285, 291 (1988). If the suspect " 'knowingly and intelligently' pursues the latter

course," there is "no reason why the uncounseled statements he then makes must be excluded at his trial." *Ibid.*

3. This Court has not had occasion to consider whether a suspect's invocation of the *Edwards* right to counsel requires a permanent prohibition on further police-initiated interrogation.[4] Cf. *Minnick* v. *Mississippi*, 111 S. Ct. at 496 (Scalia, J., dissenting) (suggesting that the *Edwards* rule, as currently applied, appears to create a "perpetual irrebuttable presumption"). That question has caused confusion in both federal and state courts, and the courts are divided as to its resolution. Compare *United States* v. *Hall*, 905 F.2d 959, 962-963 (6th Cir. 1990) (*Edwards* rule was inapplicable where defendant requested counsel three months before interrogation; *Edwards* does not "grant * * * such a blanket protection continuing *ad infinitum*"), cert. denied, 111 S. Ct. 2858 (1991), and *State* v. *Newton*, 682 P.2d 295, 297-298 (Utah 1984) (rejecting *Edwards* claim where three months elapsed between invocation of right and reinitiation of interrogation), with *Kochutin* v. *State*, 813 P.2d 298, 304 (Alaska 1991) (*Edwards* rule applies despite one-year interval between invocation of right to counsel and interrogation; "nothing in *Edwards* or in subsequent decisions of the Supreme Court * * * indicate[s] that *Edwards* should be relaxed by the mere passage of time"); *Walker* v. *State*, 573 So. 2d 415, 416 (Fla. Dist. Ct. App. 1991) (noting that *Edwards* presumption could apply "for the rest of the [sus-

[4] In *Edwards*, only one day elapsed between the suspect's invocation of the right to counsel and reinitiation of the interrogation. See 451 U.S. at 478-479. In *Minnick* and *Roberson*, the period was three days. See 111 S. Ct. at 488-489; 486 U.S. at 687.

pect's] life"); and *Commonwealth* v. *Perez*, 581 N.E.2d 1010, 1016-1017 (Mass. 1991) (assuming, without deciding, that *Edwards* rule applies despite six-month interval between invocation and interrogation). See also *Kochutin*, 813 P.2d at 310 (Bryner, C.J., dissenting) ("*Edwards*' bright line is not a laser, buring inexorably through form and substance into infinity.").

The conflict among the courts on the extent to which the principles of *Edwards* continue to apply regardless of the change of circumstances and the passage of time is starkly presented in this case, where not only was there a long period of time between the invocation of the *Edwards* right and the interrogation, but the interrogation was on a separate subject matter and there were significant intervening circumstances —the provision of counsel to the suspect and his plea of guilty to the charges that served as the basis for his initial arrest. This is therefore an appropriate case for this Court to clarify the *Edwards* rule and determine whether, as the court of appeals concluded, that rule applies for as long as the suspect is in custody, regardless of the intervening circumstances.

4. The decision in this case, if allowed to stand, will seriously impede effective law enforcement by requiring exclusion of voluntary, reliable confessions made after valid waivers of *Miranda* rights. In this case, for example, the suppression of respondent's confession may well make it impossible to prosecute him successfully for murder.

Many offenders commit multiple crimes, and it is common for a person under suspicion in connection with one offense to have at some previous point invoked the right to counsel in a separate case. Ironically, a suspect who is discovered after his arrest to

be the subject of a variety of criminal proceedings, and who is therefore held in continuous custody after invoking his *Edwards* right, will be in a better position with respect to subsequent interrogation than a suspect who has no other criminal matters pending against him and is therefore released shortly after his arrest. Thus, the rule adopted by the court of appeals, which permanently forecloses all police-initiated interrogation of such persons while they remain in custody, will impose a high cost in restricting law enforcement efforts in general, and particularly with respect to the repeat offenders who commit a disproportionate number of the nation's crimes. As a result, because "the ready ability to obtain uncoerced confessions is not an evil but an unmitigated good, society [will] be the loser." *McNeil* v. *Wisconsin*, 111 S. Ct. at 2210.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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MARCH 1992

APPENDIX A

DISTRICT OF COLUMBIA COURT OF APPEALS

No. 91-29

UNITED STATES, APPELLANT

v.

LOWELL GREEN, APPELLEE

Argued April 17, 1991

Decided May 31, 1991

Before ROGERS, Chief Judge, and STEADMAN and FARRELL, Associate Judges.

FARRELL, Associate Judge:

The government appeals from an order suppressing the confession of appellee (hereafter defendant) in this murder prosecution. The trial judge ruled that the police, in eliciting the confession, violated the prophylactic rule of *Edwards v. Arizona*, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981), as further explained in *Minnick v. Mississippi*, —— U.S. ——, 111 S.Ct. 486, 112 L.Ed.2d 489 (1990). The government argues that suppressing the confession in this case amounts to a wholly unwarranted extension of the *Edwards* rule to circumstances presenting none of the concerns that impelled that decision or its sire, *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16

L.Ed.2d 694 (1966). The government's argument has force, as the trial judge recognized; but like the trial judge we conclude that the Supreme Court's teachings in this area so far do not countenance a departure from the "bright-line" rule of *Edwards* in the present circumstances. We therefore uphold the suppression of defendant's confession.

I.

Defendant originally was arrested on July 18, 1989, on a charge of possessing a controlled substance with intent to distribute. He signed a police advice-of-rights (PD 47) form that day and answered "No" in writing to the question whether he was willing to answer questions without having an attorney present. Defendant was presented in court the next day and an attorney was appointed to represent him. He was held on bond until July 28, 1989, when the drug case was dismissed at preliminary hearing. It appears that he was then remanded to the custody of juvenile authorities, presumably in connection with a juvenile matter pending against him at the time. He was subsequently indicted on the drug charge, but failed to appear for his arraignment on August 22, 1989, apparently because he was in the custody of juvenile authorities. When eventually located, he was arraigned in the drug case on September 7, 1989. A bond was imposed and he remained in custody on the bond until September 27, 1989, when he pled guilty to the lesser included offense of attempted possession with intent to distribute cocaine. Following the plea, he was held in the Youth Center at the Lorton Reformatory while a Youth Act Study (D.C.Code § 24-803(e) (1989)) was conducted. On February 26, 1990, he was sentenced to fifteen months' incarceration under the Youth Act.

Meanwhile, on January 4, 1990, while defendant was at Lorton, Detective Donald Gossage of the Metropolitan Police Department obtained an arrest warrant charging him with the murder of Cheaver Herriott on December 30, 1988. Also on January 4, Detective Gossage obtained an order directing that defendant be brought up the next day from the Youth Center to be booked and formally presented on the murder warrant. On January 5, defendant was brought to the police Homicide Office to be booked. Detective Gossage advised him of his *Miranda* rights by reading to him both sides of the PD 47 form. Defendant chose to waive his *Miranda* rights, so indicating by his answers to four questions on the form. After he discussed with Gossage his involvement in the murder of Cheaver Herriott, defendant was again advised of his rights and agreed to make a videotaped statement, in which he confessed involvement in the robbery and killing of Herriott.

Following his indictment on April 17, 1990 on various charges including first-degree murder, defendant moved to suppress his confession on several grounds, chief among them that it had been obtained in violation of *Edwards v. Arizona, supra,* in view of his original refusal—at the time of his arrest on the drug charge—to answer questions without counsel being present. The trial judge heard testimony and initially denied the motion to suppress, concluding that "none of the reasons which underlie [the Supreme] Court's decision[s] which have addressed a criminal defendant's right to [counsel] under the 6th Amendment and his right not to incriminate himself under the 5th Amendment[] would be served by suppression" of defendant's murder confession.[1] The judge em-

[1] The government argues, and we agree, that this case presents no issue of violation of defendant's right to counsel

phasized three points. First, an "extraordinary amount of time [over five months] . . . [had] elapsed between" defendant's invocation of rights in the drug case and his waiver of rights in connection with his confession to murder. Second, although he was under some form of restraint of liberty during the entire five or more months, during the last part of that period he was not being held in jail but rather in the presumably less coercive environment of the Youth Center. Finally, defendant had had the opportunity to consult repeatedly with counsel during the period between his invocation of rights in the drug case and his waiver of rights before his murder confession.

Three days after the court's initial ruling, however, the Supreme Court decided *Minnick v. Mississippi*, *supra*. The judge reconsidered his ruling on the Fifth Amendment issue in light of *Minnick*, noting in particular that the "most significant[]" ground of his ruling had been the appointment of counsel and the opportunity defendant had had to consult counsel in the months prior to the reinitiation of questioning by the police—a factor specifically addressed by *Minnick*, and held not to justify a departure from *Edwards*. On the strength of *Minnick*'s specific holding and its reaffirmation of the "bright-line" test established by *Edwards*, the judge reversed his earlier ruling and ordered the confession suppressed.[2] The government

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under the Sixth Amendment. *See, e.g., Illinois v. Perkins*, —— U.S. ——, 110 S.Ct. 2394, 2399, 110 L.Ed.2d 243 (1990); *United States v. Gouveia*, 467 U.S. 180, 187-88, 104 S.Ct. 2292, 2296-98, 81 L.Ed.2d 146 (1984); *Woodson v. United States*, 488 A.2d 910, 912 (D.C. 1985).

[2] The trial judge adhered to his previous rejection of defendant's claims that his confession was involuntary in fact

noted this timely appeal. D.C.Code § 23-104(a)(1) (1989).

II.

In *Edwards v. Arizona* the Supreme Court held:

> [W]hen an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation, even if he has been advised of his rights. . . . [A]n accused, . . . having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police.

Edwards, 451 U.S. at 484-85, 101 S.Ct. at 1884-85. "Preserving the integrity of an accused's choice to communicate with police only through counsel is the essence of *Edwards* and its progeny." *Patterson v. Illinois*, 487 U.S. 285, 291, 108 S.Ct. 2389, 2394, 101 L.Ed.2d 261 (1988). The Court has further explained that "[t]he merit of the *Edwards* decision lies in the

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and that it was obtained during an unnecessary delay in bringing defendant to court. *See Mallory v. United States*, 354 U.S. 449, 77 S.Ct. 1356, 1 L.Ed.2d 1479 (1957); 18 U.S.C. § 3501 (1988). On appeal defendant does not argue the constitutional involuntariness of the confession as an alternative ground supporting the suppression ruling. He does raise the issue of unnecessary delay, but we reject that claim as did the trial judge. *Bliss v. United States*, 445 A.2d 625, 633 (D.C. 1982), *cert. denied*, 459 U.S. 1117, 103 S.Ct. 756, 74 L.Ed.2d 972 (1983). *See* Super.Ct.Crim.R. 5(a).

clarity of its command and the certainty of its application," *Minnick*, 111 S.Ct. at 490: "the *Edwards* rule provides 'clear and unequivocal' guidelines to the law enforcement profession," *id.* (citation and additional internal quotation marks omitted), and it "conserves judicial resources which would otherwise be expended in making difficult determinations of voluntariness." *Id.* at 489.

The government, while acknowledging these purposes of the rule, reminds us that the *Edwards* holding, like the seminal rule of *Miranda*, "is not itself required by the Fifth Amendment's prohibition on coerced confessions, but is instead justified only by reference to its prophylactic purpose." *Connecticut v. Barrett*, 479 U.S. 523, 528, 107 S.Ct. 828, 832, 93 L.Ed.2d 920 (1987). The government points to the Court's statement that "*Edwards* is designed to prevent police from badgering a defendant into waiving his previously asserted *Miranda* rights," *Minnick*, 111 S.Ct. at 489 (quoting *Michigan v. Harvey*, 494 U.S. 344, ——, 110 S.Ct. 1176, 1180, 108 L.Ed.2d 293 (1990)); "[t]he rule ensures that any statement made in subsequent interrogation is not the result of coercive pressures." *Id.* The government then mounts a multipronged case for holding that the circumstances of this case insure both that defendant was not "badgered" into revoking his initial election to communicate with police only through counsel and that "the coercive pressures of custody were not the inducing cause" of his confession. *Id.* at 492.

First, the government points out that the police reinitiated questioning only after defendant had been furnished counsel and consulted with him in the drug case, and that the renewed questioning concerned a crime entirely unrelated to the one regarding which

defendant had refused to talk without counsel.[3] These considerations alone cannot support the government's argument. In *Arizona v. Roberson*, 486 U.S. 675, 108 S.Ct. 2093, 100 L.Ed.2d 704 (1988), the Court rejected the argument that the *Edwards* rule "should not apply when the police-initiated interrogation following a suspect's request for counsel occurs in the context of a separate investigation," *id.* at 682, 108 S.Ct. at 2098; "unless he otherwise states, there is no reason to assume that a suspect's state of mind is in any way investigation-specific" when, by requesting an attorney, he has demonstrated his belief "that he is not capable of undergoing [custodial] questioning without advice of counsel." *Id.* at 684, 108 S.Ct. at 2099 (citations omitted), at 681, 108 S.Ct. at 2097. Here, defendant's insistence on answering questions only with counsel present was unqualified. *Compare Roberson* with *Connecticut v. Barrett*, *supra*.

Similarly, in *Minnick* the Court clarified *Edwards*' intent that "when counsel is requested, interrogation must cease, and officials may not reinitiate interrogation *without counsel present*, whether or not the accused has consulted with his attorney." 111 S.Ct. at 491 (emphasis added). The Court rejected the argument that an intervening "opportunity to consult with an attorney outside the interrogation room" was sufficient. *Id.* at 490. In this case it is undisputed that defendant did not have counsel present when Detective Gossage reinitiated questioning.

The government endeavors to narrow *Roberson* and *Minnick* to their individual settings. As in *Edwards* itself, it says, the accused in *Roberson* was

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[3] Defendant does not dispute that the drug offense to which he pled guilty was factually unrelated to the December 1988 murder that was the subject of his confession.

"denied the counsel he [had] clearly requested" until after the police reinitiated interrogation. 486 U.S. at 686, 108 S.Ct. at 2100. As in *Edwards* too, *Minnick* involved questioning about the same offense which the accused had refused to discuss without counsel being present. The absence of both these factors in this case, the government submits, takes it outside the reach of *Edwards* and its progeny; in particular, as the trial judge found, defendant had had repeated opportunity to consult counsel before the police approached him about the murder. But if *Edwards*, *Roberson* and *Minnick* together teach anything, it is the need for great caution in finding distinctions among cases all involving the paradigmatic original request by the accused for counsel, reflecting "his own view that he is not competent to deal with the authorities without legal advice," *Roberson*, 486 U.S. at 681, 108 S.Ct. at 2098 (citation omitted). The Supreme Court having made clear that police-initiated questioning about a separate offense and questioning after opportunity to consult counsel each fails to justify departure from *Edwards*' "bright-line, prophylactic . . . rule," *id.* at 682, 108 S.Ct. at 2098, we are not convinced that in combination the Court would regard these two factors differently.

The government next distinguishes the *Edwards* line of cases based upon the sheer length of time between defendant's invocation of the right to counsel and the initiation of questioning about the unrelated homicide offense. There is no question that to the extent *Edwards* is "designed to prevent police from badgering a defendant into waiving his previously asserted *Miranda* rights," *Minnick*, 111 S.Ct. at 489,[4]

[4] "[T]he coercion inherent in custodial interrogation derives in large measure from an interrogator's insinuations that the interrogation will continue until a confession is obtained." *Minnesota v. Murphy*, 465 U.S. 420, 433, 104 S.Ct. 1136, 1145, 79 L.Ed.2d 409 (1984) (citing *Miranda*, 384 U.S. at 468, 86 S.Ct. at 1624).

that danger is reduced when the police have made no effort to interrogate the defendant for more than five months after his assertion of rights. *Edwards*, the government argues, rests on the assumption that repeated attempts to initiate questioning will "exacerbate" the "compulsion to speak" already felt by one "who has indicated his inability to cope with the pressures of custodial interrogation by requesting counsel," *Roberson*, 486 U.S. at 686, 108 S.Ct. at 2100; and that compulsion must be substantially lessened when the police have avoided all efforts to question the person without counsel for so long a period of time.

These are substantial arguments, but there are weighty considerations on the other side of the ledger as well. Although the trial judge attached significance to the fact that defendant apparently was in the presumably less coercive environment of the Youth Center during much of the five to six-month period, the government concedes on appeal "that defendant in this case was in continuous custody for purposes of the *Edwards* prophylactic rule" (Brief for Appellant at 21 n. 16).[5] In *Minnick*, although the

[5] That concession, which as we understand it relinquishes any argument based on differing degrees of coerciveness in the custodial environment for purposes of this appeal, is probably well-advised. Although courts have recognized that different kinds of custody can be more or less coercive with regard to the possibility of self-incrimination, *see Smith v. United States*, 586 A.2d 684, 685 (D.C. 1991), the record in this case contains sparse indication of the circumstances in which defendant's liberty was restrained at the Youth Center,

relevant interval was only a matter of days, the Court emphasized "the coercive pressures that accompany custody and that may *increase* as custody is prolonged." 111 S.Ct. at 491 (emphasis added).[6] Moreover, except for his ongoing contacts with his custodial caretakers, we must assume that defendant's only contact with law enforcement officials (investigators and prosecutors) during this period was through, or in the presence of, his attorney. Hence there is nothing in the lapse of time itself from which to deduce that his original belief in his vulnerability to the pressures of custodial interrogation had diminished as he progressed through the steps of pleading guilty to the (lesser included) offense of attempted drug distribution; it is just as likely that his sense of dependence on, and trust in, counsel as the guardian of his interests in dealing with government officials intensified.

Furthermore, with the government's argument based upon the lapse of time we are again met with the Supreme Court's insistence that the *Edwards* rule be kept "clear and unequivocal." If five months in custody without evidence of police "badgering" is held sufficient to dispel *Edwards*' presumption that any new waiver of rights is involuntary, then why not three months or three weeks? At what point in time—and in conjunction with what other circum-

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an issue on which the government—with superior knowledge of the circumstances—presumably bore the burden of production, if not proof, below.

[6] *See also Arizona v. Roberson, supra*, 486 U.S. at 686, 108 S.Ct. at 2100 (pointing to the "serious risk that the mere repetition of the *Miranda* warnings would not overcome the presumption of coercion that is created by prolonged police custody").

stances—does it make doctrinal sense to treat the defendant's invocation of his right to counsel as countermanded without any initiating activity on his part? The government is candid in admitting that a focus on the lapse of time—three days versus three weeks versus three or five months—risks obscuring *Edwards*' lucid rule, but argues that this reversion to *some* sort of case-specific consideration of circumstances is inevitable if *Edwards* is not to become a caricature of itself on facts such as presented here. In his dissent in *Minnick* Justice Scalia likewise scorned what he termed the "perpetual irrebutable presumption" erected by *Edwards* and its progeny, necessitating the same result if the intervening period "had been three months, or three years, or even three decades." 111 S.Ct. at 496.[7] Ultimately, given its emphasis on the need for a bright-line rule in this area, we think only the Supreme Court can explain whether the *Edwards* rule is time-tethered and whether a five-month interval, during which no efforts at custodial interrogation took place, is too long a period to justify a continuing irrebuttable presumption that any police-initiated waiver was invalid. Until the Court provides further guidance, we are persuaded that so long as

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[7] *Amicus* the Public Defender Service points out that even if *Edwards*' presumption of involuntariness is unaffected by the passage of time or later events, it rationally "can apply only to crimes which have already occurred [and not to future crimes,] since the suspect cannot possibly be asserting a right to refuse to answer questions which could not possibly be posed." PDS thus disputes the notion that the *Edwards* rule, unless in some way time-restricted, admits of no "reasonable limiting principle." The government essentially replies that this limitation to crimes already committed is small comfort to "the public's [legitimate] interest in the investigation of criminal activities." *Maine v. Moulton*, 474 U.S. 159, 180, 106 S.Ct. 477, 489, 88 L.Ed.2d 481 (1985).

the defendant remains in custody the fact that the police did not reinitiate interrogation until five months after he invoked his right to counsel cannot be adequate reason, alone or combined with the factors already treated, to justify a departure from *Edwards*' command.[8]

The government, however, has saved what might seem to be its most potent argument until last, one that promises adherence to the requirement of some form of bright-line rule. Although defendant was still in custody awaiting sentencing when the police reinitiated questioning, he had pled guilty months earlier in the drug case that caused his arrest and invocation of rights. As the government points out, *Edwards* itself does not make its prophylactic ban permanent: the accused can lift it by reinitiating conversation with the police about the crime. Similarly, several courts have held that *Edwards*' presumption of involuntary waiver fades when the accused is released from custody.[9] The government urges that, so too, "the defendant's knowing, voluntary, and intelligent decision [here], arrived at with the advice of counsel, to plead guilty to the drug offense represents a break in events sufficient to sever

[8] Strictly speaking, we have no occasion to decide whether different considerations would come into play if the defendant, although still in custody, were transferred to the general prison population following imposition of sentence. Appellant remained in custody pending sentence on the drug charge at the time the police approached him about the murder.

[9] *E.g., Dunkins v. Thigpen*, 854 F.2d 394, 397 (11th Cir. 1988), *cert. denied*, 489 U.S. 1059, 109 S.Ct. 1329, 103 L.Ed.2d 597 (1989); *United States v. Skinner*, 667 F.2d 1306, 1309 (9th Cir. 1982), *cert. denied*, 463 U.S. 1229, 103 S.Ct. 3569, 77 L.Ed.2d 1410 (1983); *People v. Trujillo*, 773 P.2d 1086, 1091-92 (Colo. 1989) (en banc).

any link between the defendant's invocation of his *Miranda* right to counsel in connection with the drug case and police interrogation about the entirely separate crime of murder." Just as the prosecution may show "a sufficient break in events to undermine the inference that [a] confession was caused by [a] Fourth Amendment violation," *Oregon v. Elstad*, 470 U.S. 298, 306, 105 S.Ct. 1285, 1291, 84 L.Ed.2d 222 (1985), so the knowing, voluntary and intelligent waiver of Fifth Amendment protections represented by a presumptively valid guilty plea undermines the assumption that a subsequent waiver of *Miranda* rights was the product of police coercion.

There is no question that defendant's intervening plea of guilty distinguishes this case factually from *Edwards* and succeeding cases, and it is also true that in important respects "a guilty plea represents a break in the chain of events which has preceded it in the criminal process." *Tollett v. Henderson*, 411 U.S. 258, 267, 93 S.Ct. 1602, 1608, 36 L.Ed.2d 235 (1973). Nevertheless, we must decide whether by pleading guilty in the drug case defendant can be said to have "reopened the dialogue with the authorities" within the meaning of *Edwards*, 451 U.S. at 486 n. 9, 101 S.Ct. at 1885, n. 9, so as to validate his waiver of rights and interrogation on the murder charge. Defendant points out that he retained his privilege against self-incrimination on the drug charge until sentencing,[10] but that fact is not decisive; the police had little interest in gathering additional evidence of the drug charge. Rather, the answer is implicit in our foregoing discussion. Defendant pled guilty with the advice and assistance of coun-

[10] *See Estelle v. Smith*, 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981); *Boswell v. United States*, 511 A.2d 29 (D.C. 1986).

sel. Hence while the knowing and voluntary plea presumably demonstrated that acceptance of personal responsibility and not the pressures of custody caused him to incriminate himself, it also was consistent with his original election to deal with government officials only through an attorney. Indeed, from defendant's viewpoint the fact that counsel had negotiated a plea to a lesser charge sparing him a mandatory-minimum sentence, D.C. Code § 33-541(c)(1)(A) (1990 Supp.), would only have confirmed the wisdom of his choice to insist on the shield of legal representation. If defendant had other criminal involvement to conceal, or if he merely feared that he would be wrongly implicated in crimes committed by someone else, in either case we must assume he chose the shelter afforded by *Miranda* and *Edwards* to insure that the coercive pressures of custody did not cause him to incriminate himself. Defendant's plea of guilty in the drug case, because it is consistent with his election to communicate with the police only through counsel, cannot be the pivotal break in events that *Edwards* demands before a waiver can be regarded as an initial election by the accused to deal with the authorities on his own.

III.

The *Edwards* rule, like the rule of *Miranda* itself, remains "an auxiliary barrier against police coercion," *Connecticut v. Barrett*, 479 U.S. at 528, 107 S.Ct. at 832 (emphasis added). Hence it is not unfair to question the logic of a presumption that renders invalid an otherwise knowing, intelligent and voluntary waiver of *Miranda*'s auxiliary protections—and so demands exclusion of a murder confession voluntary in fact—because over five months earlier, in connection with an unrelated crime, the defendant

asked for (and was afforded) the assistance of counsel. But this Court's task is to construe the teachings of the Supreme Court as faithfully as it can in constitutional matters. In this case we have tried not to rely merely on "broad language" in *Edwards*, *Roberson* and *Minnick* which the government admits tends to neutralize the distinguishing features of this case,[11] but instead to ask whether, fundamentally, the Court would regard the custodial circumstances of this case as presenting a "situation[] in which the concerns that powered [both *Miranda* and *Edwards*] are implicated." *Berkemer v. McCarty*, 468 U.S. 420, 437, 104 S.Ct. 3138, 3149, 82 L.Ed.2d 317 (1984). In *Minnick* the Court summarized those concerns and purposes, stated that "[t]he *Edwards* rule sets forth a specific standard to fulfill these purposes," and admonished that "we have declined to confine [the rule] in other instances," *Minnick*, 111 S.Ct. at 492 (citing *Roberson*). On balance, we are left unpersuaded that the Court would confine it in the present situation either, despite the accumulation of distinguishing features the government can point to. If that judgment is wrong, then it is for the Court in this case or some future one to provide the *Leitfaden*—the red thread—through its decisions leading to the correct result.

The order suppressing defendant's confession is

Affirmed.

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[11] In general, the Supreme Court has cautioned that "words of . . . opinions are to be read in the light of the facts of the case under discussion. . . . General expressions transposed to other facts are often misleading." *Armour & Co. v. Wantock*, 323 U.S. 126, 133, 65 S.Ct. 165, 168, 89 L.Ed. 118 (1944); *see also Air Courier Conference of America v. American Postal Workers Union*, —— U.S. ——, 111 S.Ct. 913, 920, 112 L.Ed.2d 1125 (1991).

STEADMAN, Associate Judge, dissenting:

The bottom-line issue in this appeal is the degree to which the rule of *Edwards* and its progeny is to extend durationally beyond the paradigm situation involved in those cases: prearraignment continuous custody by arresting officers. *See Minnick v. Mississippi*, —— U.S. ——, 111 S.Ct. 486, 492, 112 L.Ed.2d 489 (1990) ("[w]e are invited by this formulation to adopt a regime in which *Edwards*' protection could pass in and out of existence multiple times prior to arraignment, at which point the same protection might reattach by virtue of our Sixth Amendment jurisprudence").

As reiterated in *Minnick*, the protection of *Edwards* is "designed to prevent police from badgering a defendant into waiving his previously asserted *Miranda* rights," and "to ensure that any statement made in subsequent interrogation is not the result of coercive pressures." 111 S.Ct. at 489 (citation omitted). It seems to me that the government is correct in its assertion that when an event occurs which represents a sea change in those circumstances which existed at the time the right to counsel was originally invoked, the irrebuttable presumption against a voluntary waiver of the *Miranda* right to counsel should likewise cease. I believe the Supreme Court would so rule.[1] *Cf. Oregon v. Elstad*, 470 U.S. 298, 306, 105 S.Ct. 1285, 1291, 84 L.Ed.2d 222 (1985) (prosecution may show "a sufficient break in events to undermine the inference that [a] confession was caused by [a] Fourth Amendment violation"); *Miranda v.*

[1] I recognize that Justice Scalia in his dissent in *Minnick* characterizes the majority as announcing a "perpetuality of prohibition", 111 S.Ct. at 496, but that interpretation does not, of course, speak for the full court.

Arizona, 384 U.S. 436, 496, 86 S.Ct. 1602, 1639, 16 L.Ed.2d 694 (1966) (requirement of a break in the stream of events).

It is conceded that *Minnick* constitutes no bar to questioning about a crime occurring *subsequent* to the invocation of the right to counsel. Far short of that, a number of cases have recognized that where a suspect has been released from custody and subsequently again detained, even for the same crime, an invocation of the right to counsel during the original confinement does not prevent the police from seeking a waiver of such a right upon the new confinement. *See, e.g., Dunkins v. Thigpen*, 854 F.2d 394, 397 (11th Cir.1988), *cert. denied*, 489 U.S. 1059, 109 S.Ct. 1329, 103 L.Ed.2d 597 (1989); *United States v. Skinner*, 667 F.2d 1306, 1309 (9th Cir.1982), *cert. denied*, 463 U.S. 1229, 103 S.Ct. 3569, 77 L.Ed.2d 1410 (1983).[2]

Similarly, I believe that the government is correct in its assertion that when a defendant has pled guilty to the charge which prompted the invocation of the right to counsel, circumstances have so significantly changed that any coercive effect created by the original confinement must be deemed to have been dissipated, certainly with respect to questioning about an entirely separate and distinct crime. A suspect's concern about self-incrimination that may exist during pre-trial detention must be dramatically affected once, with the advice and assistance of counsel and subject to the elaborate protections provided by Rule

[2] Here, for several months following his invocation of the right to counsel, appellant as a juvenile was apparently held not in any jail or prison as such but rather was in the custody of juvenile authorities. Nonetheless, the government for purposes of this appeal assumes that the appellant was in continuous custody for purposes of the *Edwards* prophylactic rule, and I deal with the appeal on that basis.

11, he has appeared in court and been convicted from his own mouth. Such an event entailing a knowing, voluntary and intelligent waiver of the Fifth Amendment right against self-incrimination and its consequent concerns—the very right that *Edwards* seeks to protect—should undermine any irrebuttable presumption that a subsequent waiver directed toward an entirely unrelated crime is the product of continuing police coercion. I would so hold.

APPENDIX B

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CRIMINAL DIVISION

Criminal Action No. F 265-90

UNITED STATES OF AMERICA

vs.

LOWELL GREEN, DEFENDANT

Washington, D. C.

Wednesday, November 28, 1990

The above-entitled action came on for a motions hearing before the Honorable HENRY KENNEDY, Associate Judge, in Courtroom Number 102 commencing at approximately 11:40 a.m.

APPEARANCES:

On behalf of the Government:

LISA PRAGER, Esquire
Assistant United States Attorney

On behalf of the Defendant:

JOSEPH CONTE, Esquire
Washington, D. C.

* * * * *

THE COURT: The matter presently before the Court is the Defendant's Motion to Suppress the statements which the Government indicates it wishes to use as evidence in this case, some of which were videotaped on January 5th, 1990.

The Court has reviewed the papers filed in connection with this motion and considered the argument of Counsel and has had an opportunity to consider the testimony of the witnesses.

Initially the Court knows that its ruling as to whether Mr. Green's statement was given voluntarily and after being given and then waiving his Miranda Rights depends upon its assessment as to the credibility of the witnesses.

There are only three possible alternatives as to what happened after Mr. Green was brought to the Homicide Office of the Metropolitan Police Department shortly after eleven o'clock a.m. on January 5th, 1990.

Mr. Green's account, Detective Gossage's account or a scenario which might emerge from the different accounts of the two.

The Court has no reason to discern a scenario which is different from that of Mr. Green and Detective Gossage. And as between those two accounts, that is the account given by Mr. Green and Detective Gossage, the Court credits Detective Gossage's account for the following reasons and based upon the following factors.

One. Nothing which he said is inherently [in]-credible. Two. While Detective Gossage does have a professional interest in this case and indeed, is in the business of ferr[e]ting out crime as he had been in January of 1990 for seventeen years, that interest pales when compared with the interests of Mr. Green in giving testimony which would serve his interests

in having this very damaging piece of evidence, or pieces of evidence, suppressed.

Three. Mr. Green has been previously convicted of a crime, a fact which the Court may and does consider in assessing his credibility.

And four, the evidence which is present for all to see and hear which contradicts some of Mr. Green's sworn testimony at the Motions Hearing.

For example, when questioned at the motions hearing whether he had received lunch at the police station he indicated unequivocably that he had not.

This conflict[s] absolutely and without explanation with his statement made on the videotape that he had been given lunch. At the motions hearing Mr. Green was questioned as to whether he was threatened, he indicated that he had been.

The threats, I suppose, that are being referred to is the threat of receiving—being charged with two offenses unless he gave a statement.

On the videotape, while it's not quite so clear as to what was meant and so it's not as clear[ly] in conflict as the testimony concerning the giving of the lunch, he testified that he had not been threatened.

The Court has reviewed the deposition of Ms. Mary Taylor and with respect to that testimony simply does not attach the same significance to it as Mr. Green does.

In any event, it's clear that Ms. Taylor is not able to [in]voke either Mr. Green's 5th or 6th Amendment right no[r] to have Counsel. Having made this credibility finding which leads the Court to conclude that Mr. Green was brought to the Homicide Office of the police department, was given his Miranda Rights in the way in which Detective Gossage testified they were given on the stand, that Mr. Green understood

his rights and that he appreciated them and thereafter waived them, the Court finds no basis to suppress any of these statements on the ground that they were given in violation of Miranda or were involuntarily made.

To move to the next prong of the Defense argument, the Court is of the view that a very very serious question is raised as to whether these statements should be suppressed as a result of the Supreme Court holdings in Roberson vs. Arizona, unlike the case of Espinosa, to which reference has been made, sets forth controlling preceden[t] for this Court.

Roberson vs. Arizona—Arizona vs. Roberson extended the rule of Arizona vs. Edward[s] which held that a suspect who has "expressed his desire to deal with the police only through Counsel is not subject to further interrogation by the authorities until Counsel has been made available to him unless the accused himself initiates further communications."

In Roberson, the accused was arrested on the scene for a just completed burglary and indicated that he did not wish to speak with the authorities without a lawyer.

Three days later while the accused was still in custody pursuant to the arrest three days earlier, a different police officer inquired about another burglary that had been committed the day before the suspect was arrested.

This officer, that is, the second interrogating officer, had given the Defendant his Miranda rights which presumably were effective in the absence of the Supreme Court's ruling that the giving of the rights w[as] ineffective as a matter of law.

To advise the Defendant of his rights under the 5th and 6th Amendment the Supreme Court held that

the rule which it had laid down in Arizona vs. Edwards applied and required suppression of the Defendant's statement. And the fact that the subsequent interrogations by the police concern[ed] an offense unrelated to the prior offense about which the suspect refused to speak without a lawyer, or that the second interrogating official did not know that the suspect had earlier requested a lawyer before speaking with the police, did not matter.

The Court emphasized the fact that the presumption raised by a suspect's request for Counsel that he considers himself unable to deal with the procedures of custodial interrogation without legal assistance does not disappear simply because the police ha[ve] approached the suspect still in custody, still without Counsel, about a separate investigation.

In this Court's view the provision of Counsel to Mr. Green prior to his interrogation in this case is a significant and dispositive factual distinction which leads the Court to find that Arizona vs. Roberson does not require suppression of the statement.

The precise holding of Roberson is that a criminal suspect who has expressed a desire to deal with the police only through Counsel is not subject to further interrogation even with respect to a subsequent unrelated offense by the authorities until Counsel has been made available to the suspect or unless the suspect initiates further communications.

The Court admits that there are broad statements of law set forth in Roberson which if followed to the letter would require suppression of the Defendant's statement in this case.

For example, the Supreme Court discussed at length the case of Edward[s] vs. Arizona. The Court in Roberson noted that in Edwards it reconfirmed the view which it had expressed in Miranda, the views

expressed—its views expressed in Miranda and to lend substance to such views "emphasized that it is inconsistent with Miranda and its progeny for the authorit[ities] at their instance to reinterrogate an accused in custody if he has clearly asserted his right to Counsel.

We concluded that interrogations may only occur if the accused himself only initiates further communication."

The Court also expressed "that if a suspect believes that he is not capable of undergoing such questioning without advice of Counsel, then it is presumed that any subsequent waiver that has come at the authorities[']' bequest and not the suspect's own instigation is itself the product of the inherently compelling pressures and not the purely voluntary choice of the suspect."

Moreover this Court, as it stated during the course of argument in this case, is given reason to pause by the d[iss]ent of Justice Kennedy in the Roberson case which anticipated precisely the significance of the majority decision in Roberson for the factual scenario which is presented here.

A[c]knowledging its concern, the Court is reminded of the words of our Court of Appeals in the case of Craft vs. Craft and the Supreme Court's decision in Armour vs. Waintok, Craft vs. Craft, Armour vs. Waintok. Neither of these are criminal cases, the cites are Craft vs. Craft, 155 At.2d. 910, a 1959 case. Armour, A-r-m-o-u-r and Company vs. Waintok, 323 U.S. 126, a 1944 case.

"It is well to remember that significance is given to broad and general statements of law only by comparing the facts from which they arise with those facts to which they supposedly apply.["]

The record in this case memorializes the great difference between the factual scenario in Roberson and that of the case at bar. Among those are one, the extraordinary amount of time which elapsed between Mr. Green's invocation of his desire to speak only with Counsel present in July of 1989 and the subsequent waiver of such right—in excess of five months later in January of 1990.

Two. Unlike in Roberson, Mr. Green was not continuously in custody of the police and therefore arguably subject to the same coercive pressures in January 1990 as he was in July of 1989.

In fact, Mr. Green was in the custody of the Department of Corrections during the last portion of the time between July 1989 and January 5, 1990 and not with the police during the course of his testimony. Mr. Green gave some hint as to what his day-to-day life was like at the Youth Center.

That is, he was being studied for a Youth Act study. He had to get up to go to his programs. The point is that unlike the cases that have dealt with this issue, Arizona vs. Edwards and Roberson vs. Arizona, the Espinosa case and there are other cases none really on point as much on point as those that I have discussed, it simply cannot be said that there was the same type of custody.

But most important that it just can't be said that the same coercive pressures were at stake. But most significantly, of course, and the l[i]nch pin, it seems to me of the Court's decision in Arizona and the one which the Court finds dispositive in this case along with the others, is that Mr. Green in fact had been appointed an attorney in July of 1989 with whom he could have talked had he decide[d] to do so when he was asked in January of 1990 whether he was willing to talk with a lawyer.

The Court notes that the Supreme Court has never said that the investigative technique of questioning suspects is a tainted process. Under the facts of this case unless the technique itself is considered to be tainted, none of the reasons which underlie the Court's decision[s] which have addressed a criminal defendant's right to cancel [*sic*] under the 6th Amendment and his right not to incriminate himself under the 5th Amendment, would be served by suppression of these statements.

Moving on to the third prong of Mr. Green's argument in favor of suppression that his statements were taken in violation of 18 USC Code 3501C for [*sic*] D.C. Code, Section 140 and the principle set forth in the case of McNab[b] vs. United States and Mall[o]ry vs. United States.

The Court notes that the Defendant's argument in this regard depend[s] upon a finding that he was arrested at sometime other than when Detective Gossage informed Mr. Green that he was under arrest.

The Court is unable to be precise in its finding of when it is that Detective Gossage indicated that Mr. Green was under arrest. I simply failed to note it in my notes and do not have an independent recollection of when he said it was that he gave the specific time.

What he stated was that Mr. Green arrived at the Homicide Branch shortly—at 11 o'clock a.m. or shortly thereafter. That he exchanged what I would call a salutation with Mr. Green and told [him] that he would be with him later.

It is the Court's belief that Mr., based upon Detective Gossage's testimony, that Mr. Green was told that he was under arrest or was being placed under arrest about one-half to forty-five minutes later.

The Court is aware that the Rights Card was executed at 12:05, but I will go on and frankly, Counsel, if—I think you understand my ruling.

I credit Detective Gossage's testimony so it is what it is and so if there is in the record testimony as to when this man was placed under arrest, it speaks for itself. But I think that the Court announces of this will not—that it simply won't make any difference.

Even if the Court should determine that an arrest took place sometime prior to this time, that is, when Detecti[v]e Gossage says you are under arrest, it clearly would not have been before 10:17 a.m. when officers of the Metropolitan Police Department took Mr. Green from the custody of the United States Marshal service and it is clear that that is when the transfer took place.

The Court relies upon the—a paper which I don't know whether it bears a number or not which I think it should, but it's—it's a paper which has at the top United States—U.S. Department of Justice, United States Marshal Service, time out 10:17, and I do believe that this paper should be made part of the record, the Court has considered it.

It's at that time at the earliest, and the Court believes that it is probably the case that that is when the time should begin to run. It shouldn't be that an officer's statement, you are under arrest, provides the, you know, the time period.

It's that time when Mr. Green was taken into custody by the Metropolitan Police Department pursuant to an arrest warrant that had been previously sought and approved by a Judge.

Using the time of 10:17 at the earliest as a bench mark, Mr. Green began giving his statement after voluntarily waiving his rights not to speak at all or

without the presence of an attorney shortly after executing the PD47 at 12:05 p.m. within two hours of his arrest.

Having voluntarily beg[u]n his statement in the absence of Mr. Green's request to cease talking, the Court is unaware of any principle which would require the police to stop their questioning at 1:17 p.m. even if for the Court to determine that Title 4, D.C. Code Section 140 applies rather than 18 USC 3501C.

In the Court's view the videotaping was simply a continuation or memorialization of the same statement which Mr. Green gave to Detective Gossage that began sometime earlier. And again, the Court affixes that time at some time between 11:30 and 11:45.

With reference to the issue of which of the statutory provisions apply the Court would simply note that it is probable, it is probably the case the 18 USC 3501C rather than Title 4, Section 140 which applies in view of the fact that 350[1]-C is later in time and is the statutory provision which is specifically referred to [in] Rule 5A of this Court, the Court further doubts that the rule of lenity applies to the statute which governs the admissibility of evidence even if that evidence is evidence which [is] sought to be admitted in a criminal case as [im]pposed to statutes which set[] forth the elements of offenses and the punishment which might be opposed upon convictions of offenses.

The Court further notes that cases of United States vs. Pettyjohn which is good law in this jurisdiction hold that with respect to the Defendant's right to a speedy presentment before a magistrate, the Defendant's waiver of his 5th Amendment privilege also is a waiver of that right for the time, for that period of time when the statement is being made and that subsequent delay is not to be given retroactive effect.

The Court therefore denies for the reasons stated th[e] Defendant's Motion to Suppress the statements in this case. And whiie we are at this point, I believe it would be prudent to mark all of the matters to which the Court has indicated that it has taken into consideration but which perhaps formerly w[ere] not admitted into evidence.

I have in mind the booking order itself and the—I don't know what you would call this, it's a caption that reads, Prisoner Remand or Order to Receipt for United States Prisoner. That's at least what I would suggest.

The Court also, while it did not make reference to the form which sets forth the condition of release of Mr. Green in the July case, clearly indicates that he was appointed an attorney. At least that's what I believe should happen. I will hear what you have to say if you think not.

MR. CONTE: That's fine, Your Honor. My only problem is that I didn't know until—the issue of constant incarceration is just not an issue I was prepared to address. My client advises me that he was in fact in continuous incarceration from July 19th.

THE COURT: The record should be clear that that's what I had assumed.

MR. CONTE: The Court stated that he was not. I thought he was not either.

THE COURT: No, no, no, the Court assumes that from July 19, 1989 through January 5, 1990, he was in custody clearly, that is, that he was not free to go home.

The distinction the Court draws is between being in custody of the police, in the custody of the police, first of all, because he was not in the custody of the police, he was in the custody of the Department of Corrections and the kind of custody.

I mean, I just don't—this is a great case for great minds to draw these distinctions, you know. But it seems to me that it's a difference between always sitting at the jail three days, four days, and going down to the Youth Center, being talked with by psychiatrists, psychologists, and being involved in programs and so on and so forth.

That seems to me to be a different kind of custody. I did not mean to suggest or to find that Mr. Green was in—was free. That's not what the Court meant to say. All right. Anything else?

MS. PRAGER: No, Your Honor. I can't remember if Mr. Conte tendered the document or the Defense—it doesn't matter, we can have it marked as Government's or Defendant's exhibits. Mr. Conte knows which belongs to whom.

MR. CONTE: It does not matter for the record.

THE COURT: Let's call these Government's Exhibits and let's make sure that they are in the record and labeled correctly.

MR. CONTE: I suppose that the Rights Card from the July 19th, 1989 matter should be a part of the record and it's attached as an addendum in my motion.

THE COURT: Yes, I think that it should be. Do you have any objection to that?

MS. PRAGER: No, Your Honor.

* * * * *

APPENDIX C

SUPERIOR COURT OF THE
DISTRICT OF COLUMBIA
CRIMINAL DIVISION

Criminal Action No. F265-90

UNITED STATES OF AMERICA

vs.

LOWELL GREEN, DEFENDANT

Washington, D. C.
Tuesday, December 4, 1990

The above-entitled action came on for trial before the Honorable HENRY H. KENNEDY, Associate Judge, in Courtroom Number 102, commencing at approximately 10:1[illegible] m.

APPEARANCES:

On behalf of the Government:

LISA PRAGER, Esquire
Assistant United States Attorney

On behalf of the Defendant:

JOSEPH R. CONTE, Esquire
Washington, D.C.

* * * * *

THE COURT: The Court is of the view that with the latest pronouncement from the Supreme Court, the highest Court of this land, given its interpreta-

tion of the decisions which preceded the case of *Arizona vs. Edwards*, that the decision requires suppression of the statement; that the Supreme Court has set up, as mandated, a bright, quote, unquote, bright line test, and that is one of the problems, in my view, of bright line tests. They kind of do not permit for the type of individual consideration of the facts which precedent, which do not set forth such bright lines permit.

The record is clear as to what the Court has found to be the case here. And I suppose what is required is that whenever a person is in custody, the police must check to see whether counsel has been appointed, and then before questioning that person, confer with counsel.

I believe that the Minnick Case requires this result, and so the Court reverses its ruling made on Friday and grants the motion, the defense motion to suppress the—all of the statements which were under consideration, both the oral statements to Detective Gossage, as well as the videotape memorialization of it. That's the Court's decision.

MS. PRAGER: Your Honor, given the Court's decision, the Government is requesting the 30-day continuance, which I believe we're entitled to to decide whether we're going to pursue an appeal.

THE COURT: All right. I don't have my calendar down here. Suggest a date in 30 days.

MR. CONTE: I would object, just for the record, Your Honor.

THE COURT: You object to?

MR. CONTE: I would object to any continuance. The jury is here. We haven't sworn them. We did request this Court swear the jury yesterday.

THE COURT: Yes. And I just smile, because,

boy, these rules are so complex. But, I think that the statute does permit the Government 30 days, does it not?

MS. PRAGER: Yes, Your Honor. And I think in this circumstance we can certainly—I'm personally certifying to the Court that the video taped statement is a substantial piece of evidence that the Government would use in its case-in-chief, and that this appeal, should it be taken, would not be taken for delay. And I think that with those representations, we are entitled to the 30-day continuance.

* * * * *

APPENDIX D

DISTRICT OF COLUMBIA COURT OF APPEALS

No. 91-29

UNITED STATES, APPELLANT

v.

LOWELL GREEN, APPELLEE

Before: *Rogers, Chief Judge; Ferren, Terry, *Steadman, Schwelb, *Farrell, Wagner, and King, Associate Judges.

ORDER

[Filed Nov. 25, 1991]

On consideration of appellant's petition for rehearing or rehearing en banc, the response and the opposition thereto, it is

ORDERED by the merits division* that the petition for rehearing is denied; and it appearing that a majority of the judges of this court has not voted to grant the petition for rehearing en banc, it is

FURTHER ORDERED that the petition for rehearing en banc is denied.

PER CURIAM

Associate Judges Steadman, Schwelb, Wagner, and King voted to grant rehearing en banc.

Copies to:

Henorable Henry H. Greene

[Frederick Beane]
Clerk, Superior Court

John R. Fisher, Esquire
Assistant United States Attorney

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James Klein, Esquire
Public Defender Service

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91-1521

IN THE UNITED STATES SUPREME COURT

(9)

UNITED STATES OF AMERICA

v.

LOWELL MICHAEL GREEN

No.

MOTION TO PROCEED IN FORMA PAUPERIS

Respondent, Lowell M. Green, by and through his previously appointed counsel asks this Court for leave to proceed in forma pauperis in connection with the above-captioned action. An affidavit complying with 28 U.S.C. §1746 is attached in the form prescribed by the Federal Rules of Appellate Procedure, Form 4. Respondent alerts this Court that he was previously represented

by appointed counsel before the District of Columbia Superior Court and the District of Columbia Court of Appeals.

Respectfully submitted,

Joseph R. Conte
Bond, Conte & Norman
601 Pennsylvania Ave., N.W.
Washington, D.C. 20004
(202) 638-4100
Counsel for Respondent

Dated: April 24th, 1992

IN THE UNITED STATES SUPREME COURT

UNITED STATES OF AMERICA v. LOWELL MICHAEL GREEN	No.

AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED IN FORMA PAUPERIS

I, Lowell M. Green, being first duly sworn, depose and say that I am the respondent, in the above-entitled case; that in support of my motion to proceed on appeal without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor, that I believe I am entitled to redress; and that the issues which I desire to present on appeal are the following:

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting the appeal are true.

1. I am not presently employed. I have not been employed since 1988 and the amount of the salary and wages which I received at that time were $400.00 per month.

2. I have not received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other sources.

3. I own only 100.00 in cash and I do not own a checking or savings account.

4. I do not own any real estate, stocks, bonds, notes, automobiles, or other valuable property.

5. Following is a list of persons who are dependent on me and their relationship to me:

____

____

____

I understand that a false statement or answer to any question in this affidavit will subject me to penalties for perjury.

[illegible], D. C.

Washington, D. C.

Dist[illegible]

Lowell M. Green

SUBSCRIBED AND SWORN TO before me this 6th day of April, 1992.

My Commission Expires July 14, 19[illegible]

My Commission Expires July 14, 19[illegible]

Subscribed and sworn to before me

[illegible]

QUESTION PRESENTED

Whether the concerns that empowered both Miranda and Edwards are implicated when the police reinitiate interrogation of a defendant who has been in continuous custody for months undergoing observation to determine his eligibility for favorable sentencing and when the defendant has previously indicated he wishes to deal with law enforcement authorities only through counsel.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

No.

UNITED STATES OF AMERICA

v.

LOWELL GREEN, Respondent

RESPONSE TO A PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

Joseph R. Conte, the undersigned counsel, on behalf of Mr. Lowell Green, respectfully responds to the Government's petition for a writ of certiorari challenging the judgment of the District of Columbia Court of Appeals in this case.

OPINION BELOW

The opinion of the District of Columbia Court of Appeals is reported at 592 A.2d 985.

JURISDICTION

The court of appeals entered judgment on May 31, 1991. The Government's petition for rehearing was denied on November 25, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

COUNTERSTATEMENT

Mr. Green was in custody at the Department of Corrections Youth Center facility pending sentencing on a plea bargained charge of attempted possession with intent to distribute cocaine. He was undergoing a sixty-day observation period to determine his eligibility for favorable sentencing under the District of Columbia Youth Rehabilitation Amendment Act of 1985. (App. A,

infra, 2a; see D.C. Code Ann. § 24-803(e) (1989). Mr. Green had requested counsel earlier in connection with police-initiated interrogation and he was represented by counsel throughout his past dealings with the police. (App. A., infra, 2a) His routine at the Youth Facility included arising around 8:30 a.m., attending schooling programs, and meeting with his C&P officer regarding the likelihood of his sentencing determination. (App. C, infra, Tr.I p. 56)

At around 4:00 a.m. on January 4, 1990 and without any initiating activity on his part, Mr. Green was taken from his sleep and transported to the D.C. police station where he ultimately made incriminating statements. He arrived in Washington, D.C. at approximately 6:00 a.m. (App. C, infra, Tr.I p.56) He was held in the "bullpen" at the courthouse until 10:17 a.m., at which time two police officers took him into their custody. (The parties stipulated to this fact.) He was then placed in a paddy wagon where he stayed for more than an hour and a half. (App. C, infra, Tr.I p.58-60). After being transported to a police station at 300 Indiana Avenue, N.W., a short distance from the courthouse, Mr. Green was taken into the station (App. C, infra, Tr.I p.60), and for the first time he was advised of why he was brought there. Approximately nine hours had transpired since the initial intrusion into Mr. Green's sleep.

Detective Gossage told Mr. Green that he was "here for murder[ing Jamaican Tony]." Mr. Green asked for his lawyer. (App. C, infra, Tr.I p. 60) No lawyer was provided. Detective Gossage directed Mr. Green to "sign this," referring to a PD 47 rights card. (App. C, infra, Tr.I p.61-62) The detective told him, "You can make this hard on yourself or make it easy. We got you for Kevin Henson too, you are a suspect in that case. If you don't tell us something about Jamaican Tony, you are going to get charged for both of these cases." (App. C, infra, Tr.I p.62) Mr. Green was afraid. Id. He agreed to waive his rights and make a videotaped statement.

The officers videotaped Mr. Green admitting that he knew who the principal was in the murder of the Jamaican Tony murder, and implicating himself as a possible aider and abettor. Mr. Green was never provided with the assistance of counsel. The videotape clearly shows that the interrogation was without counsel present. (App. C, infra, 3a)

2. Mr. Green was indicted for murder. He moved to suppress his confession, claiming that it resulted in violation of Edwards v. Arizona, 451 U.S. 477 (1981) and Arizona v. Roberson, 486 U.S. 675 (1988). The trial court initially denied defendant's motion to suppress, basing its denial on (1) the

court's attribution of greater credibility to Detective Gossage,[1] and (2) the court's belief that the policies underlying the Supreme Court's decisions in the past would not be served by suppression of defendant's statement in this instance. (App. B, infra, 25a-26a)

Three days later the trial court reversed itself, following Minnick v. Mississippi, 111 S.Ct. 486 (1990). (App. B, infra, 31a-33a)

3. The District of Columbia Court of Appeals affirmed the trial court's final ruling. (App. A, infra, 1a-18a). The Court of Appeals relied on the policies underlying Edwards as they had been recently clarified in Minnick, 111 S.Ct. 486 (1990). It noted that "preserving the integrity of an accused's choice to communicate with police only through counsel is the essence of Edwards and its progeny." (App. A, infra, 5a, citing Patterson v. Illinois, 487 U.S. 285, 291 (1988)) The court refused to follow the Government's argument that the inherent coercive pressures accompanying custody were not present under the facts of this case. (See App. A, infra, 9a-10a). Furthermore, the court of appeals found unpersuasive the fact that five months

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[1] This finding was not challenged on appeal. Instead, Mr. Green relied on the applicable law applied to the undisputed facts, i.e., that he was in custody, that he was represented by counsel, and that he responded to improper police-reinitiated interrogation.

transpired between the defendant's initial request for counsel in the drug-related matter and the more recent police-reinitiated interrogation. The court stated, "there is nothing in the lapse of time itself from which to deduce that [the defendant's] original belief in his vulnerability to the pressures of custodial interrogation had diminished as he progressed through the steps of pleading guilty to the (lesser included) offense of attempted drug distribution." (App. A, infra, 10a) Indeed, the court noted that "it is just as likely that [the defendant's] sense of dependence on, and trust in, counsel as the guardian of his interests in dealing with Government officials intensified." (Id., citing Minnick, 111 S.Ct. at 491 ("the coercive pressures that accompany custody . . . may **increase** as custody is prolonged.")). Finally, the Court of Appeals stated that if the court were to make an exception for this case then the issue of time would permanently muddy the "clear and unequivocal" Edwards rule. (App. A, infra, 10a)

REASONS FOR DENYING THE GOVERNMENT'S PETITION

The Government seeks to use this case as a vehicle to muddy the bright-line rule that police-initiated interrogation must cease after the suspect has requested the assistance of counsel.[2] In doing so, the Government egregiously misguides this Court on the scope of the protections afforded by the Miranda-Edwards rule and the voluntariness of Mr. Green's confession. First, the Government inaccurately states that the rule protects only the accused from police badgering. Second, by asserting that there was "no hint of coercion" in this case, the Government inaccurately states the facts. Each of these misstatements is addressed in the following paragraphs.

1. The Government inaccurately asserts that the Miranda-Edwards rule protects the accused only from police badgering. In doing so, it assumes that police badgering is an easily definable act which has easily definable effects on the free will of the accused. The Miranda-Edwards guarantee recognizes the inherently coercive nature of police methods and it preserves the accused's right to face police interrogation with the assistance of counsel. The rule is intended to preserve not only the accused's

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[2] Hereafter, the bright-line rule established under Miranda and Edwards is referred to as the "Miranda-Edwards" rule.

Fifth Amendment right against self-incrimination but all of humanity's interest in protecting against coerced and unreliable confessions. The "use of involuntary verbal confessions in criminal trials is constitutionally obnoxious" not only because of their unreliability but also because they "offend the community's sense of fair play and decency." Rochin v. California, 342 U.S. 165, 173 (1952) (J. Frankfurter); Miranda, 86 S.Ct. at 1619-20 (involuntary confessions offend notions of acceptability in a society which has rejected the inquisitorial method of prosecution); see Edwards v. Arizona, 451 U.S. at 484-86; Arizona v. Roberson, 486 U.S. at 681-82; Minnick v. Mississippi, 111 S.Ct. at 490. Cf. Moran v. Burbine, 475 U.S. at 425-26; Kamisar, Inbau & Arnold, Criminal Justice in Our Time 19-36 (Howard ed. 1965) (providing the history of Miranda-Edwards rule).

The Government's analysis of the rule ignores the principal policy behind the rule, namely, to assure that only voluntary confessions are part of the judicial process. Police methods are inherently coercive. Indeed, maintaining an authoritarian edge is a goal of the law enforcement system. See, e.g., Escobedo v. Illinois, 378 U.S. 478 (1964) (recognizing that police interrogation methods are inherently coercive); Miranda v. Arizona, 384 U.S. 436, 444-58 (1966) (enumerating many ways in

which custodial interrogation is inherently coercive and violative of an individual's right to be free of coerced self-incrimination); Edwards v. Arizona, 451 U.S. 973 (1981) (reconfirming the Court's earlier views on police coerciveness and establishing a bright-line rule); Smith v. Illinois, 469 U.S. 89 (1984) (reconfirming the need for a bright-line rule barring police-reinitiated interrogation when an accused requests counsel); Moran v. Burbine, 475 U.S. 412, 426 (1986) (reconfirming the Court's recognition of the inherently coercive interrogation process in the context of suspect's initiation of a voluntary waiver). Because police methods are inherently coercive, this Court has determined that the best way to ensure the voluntariness of confessions is to provide a bright-line rule. The bright-line rule provides clear and unequivocal guidance to the Government and especially law enforcement personnel, inhibiting their professional incentives to reinitiate interrogation. That bright-line rule holds inadmissible any confessions resulting from police-reinitiated interrogation. Edwards v. Arizona, 451 U.S. 477 (1981) (establishing bright-line rule; Arizona v. Roberson, 486 U.S. 675 (1988) (recognizing that the bright-line rule benefits the Government by providing certain procedures); see Minnick v. Mississippi, 111 S.Ct. 486 (1990) (reconfirming that the accused's initial request for an attorney

is determinative); McNeil v. Wisconsin, 111 S.Ct. 2205, 2209 (1991) (reconfirming that the Miranda-Edwards guarantee protects the suspect's desire to deal with the police only through counsel).

2. The Government asserts that the bright-line rule is burdensome to law enforcement and results in the suppression of some confessions even though these confessions were obtained "without any hint of coercion or police overreaching." (Govt's Petition at 6) It is difficult to imagine a situation where the police do not improperly influence an accused's decision when, knowing that the accused has asked for the assistance of counsel, the police reinitiate interrogation. This Court has recognized for a long time that the interest in effective law enforcement does not rest on coerced confessions, and that uncoerced confessions following an accused's request for counsel are tainted by the inherently coercive atmosphere of police methods and the custodial environment. The bright-line rule provides specificity, and the resulting gain in specificity outweighs the burdens that the Miranda-Edwards rule imposes on law enforcement. Fare v. Michael C., 442 U.S. 707, 718 (1979); Minnick, 111 S.Ct. at 490.

3. The Government cites the following facts as distinguishing this case from the policies underlying the

Miranda-Edwards line of cases: (1) the defendant had previously pled guilty as a result of a plea bargain to the pending drug charge, (2) the defendant had been in custody for five months in connection with a pending drug charge, and (3) the defendant had been assisted by counsel prior to the police reinitiated interrogation on the new murder charge. Each of the three factors is addressed in turn.

(a) The entry of a guilty plea in a first matter does not negate an accused's right to choose not to incriminate himself in another matter until sentencing in the first matter is complete. As in most cases, Mr. Green's entry of a guilty plea in the drug-related case represented his decision in favor of accepting the Government's bargain after weighing the benefits of a jury trial against the benefits of the plea bargain. However, a plea bargain is final only if the sentencing judge determines it is fair in light of a myriad of related factors. Numerous cases demonstrate that a plea bargain is not final unless and until both sides fully perform and the court accepts the terms of the bargain. See, e.g., Santobello v. New York, 404 U.S. 257 (1971) (Government breached agreement at sentencing allowing defendant to reinstate not guilty plea); Ricketts v. Adamson, 107 S.Ct. 2680 (1987) (defendant breached agreement allowing

Government to fully prosecute); F.R.Cr.Pro. 32(d)[3] (guilty plea may be withdrawn for any fair and just reason before sentence is imposed); see also Rice v. Olson, 324 U.S. 786 (1945) (entry of guilty plea without counsel is not necessarily a waiver of Fifth Amendment rights). In sum, the entry of a guilty plea does not trigger a pivotal break in the process negating the accused's Miranda-Edwards rights; instead, it merely demonstrates a good-faith step in the bargaining process. When Mr. Green was interrogated on the murder-related matter, the sentencing judge had not yet finally accepted the terms of the bargain.

Even the entry of a guilty plea would not, absent an agreement to the contrary, give the police the right to interrogate a defendant after he or she enters a plea of guilty. In instances where the prosecutor seeks the assistance of the accused in prosecuting other individuals or solving other crimes, express provision is made in the plea agreement. Normally such assistance requires some additional consideration, for example, promises that the prosecutor will make the defendant's

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[3] Compare D.C. Superior Court Rule of Criminal Procedure 32(e).

> **Withdrawal of guilty plea.** A motion to withdraw a plea of guilty or of nolo contendere may be made only before sentence is imposed or imposition of sentence is suspended; but to correct manifest injustice, the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw the plea.

cooperation known to the sentencing judge or that the Government will not prosecute the defendant for those crimes in which he or she assists the police. Absent any written agreement, these promises are made part of the record at the time the defendant enters the guilty plea. (In instances where the defendant agrees to cooperate against his co-accused, the agreements normally provide that sentencing of the defendant will be continued until after he or she fully performs in accordance with the agreement. The defendant is represented by his counsel during the entire process; counsel ensures that the prosecutor performs in accordance with the agreement).

Moreover and as the District of Columbia Court of Appeals recognized, a defendant's guilty plea results from the advice and assistance of counsel, which is consistent with the defendant's original election to deal with Government officials only through an attorney. (App. A, infra, 13a-14a) Indeed, from Mr. Green's viewpoint the fact that counsel negotiated a plea to a lesser charge possibly sparing him a mandatory-minimum sentence in the drug-related case probably confirmed the wisdom of his choice of insisting on the shield of legal representation. Id. As the court of appeals noted, on these facts it is better to assume that the defendant chose the shelter afforded by the Miranda-Edwards guarantee. To hold otherwise would be

inconsistent with Mr. Green's prior election to communicate with the police only through counsel. Id. In sum, the fact that Mr. Green had entered a guilty plea in the pending drug charge did not trigger a pivotal break in events in the adjudicatory process warranting an exception to the Miranda-Edwards guarantee.

(b) The Miranda-Edwards rule protects the accused for so long as he or she may be subjected to law enforcement interrogation methods. The Government asks this Court to make an exception to the bright-line Miranda-Edwards rule because five months transpired between Mr. Green's initial request for an attorney in the drug-related matter and the time the police reinitiated interrogation in the murder-related matter. As support for this position, the Government relies on the assumption that the custodial process diminishes in effectiveness over time, resulting in the accused's enjoyment of free will even if he or she does not enjoy freedom. (Gov't Petition at 11) Clearly this assumption runs counter to the goals ascribed to by the law enforcement custodial system. It is unlikely that the custodial administrators intend for the defendant's submission to diminish over time. In this particular case, since Mr. Green was undergoing observation at the time to determine his eligibility for favorable sentencing treatment, it is likely that he felt

that his cooperation with police at the expense of his own rights was compelled to further his chances for favorable sentencing.[4]

In addition, even if Mr. Green had developed a comfortable feeling while in custody, that feeling was seriously intruded upon when he was rousted out of bed at 4:00 in the morning because the police wished to have him downtown. Certainly, since Mr. Green was already in custody, this extraordinary intrusion into his routine at the Youth Facility was unnecessary; Mr. Green was not going anywhere. As the police knew at the time and in accordance with their training, their authoritarian edge was magnified by their ability to intrude on Mr. Green's peace of mind and stable routine. This kind of police maneuvering was precisely the subtle coercion recognized by the Miranda Court. 384 U.S. at 448-58, 448n8 (recognizing that police methods are inherently coercive and citing several police manuals encouraging coercive tactics). Contrary to the Government's assertion, this case is an example of why the Miranda-Edwards guarantee is properly tethered to custody and not time. To hold otherwise by following the Government's argument

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[4] At the time of his interrogation, Mr. Green did not confess to committing the murder. He admitted that he knew who committed the murder and in doing so, implicated himself as a possible aider and abettor. Mr. Green is not sophisticated. The likelihood that he realized the criminal import of his admissions at the time of police-reinitiated interrogation is slim.

would muddy the bright-line rule and serve as a flag to law enforcement authorities, alerting them that over time they may exert overt influence over the accused's initial refusal to communicate without counsel present.

(c) The fact that the defendant spoke with counsel prior to police reinitiated interrogation does not constitute a pivotal break in the protections afforded by the Miranda-Edwards rule. The Government maintains that because Mr. Green had previously consulted with his attorney concerning a charge unrelated to the one in issue when the police reinitiated interrogation, his invocation of his Miranda-Edwards rights were negated. In doing so, the Government tries to erode the teachings of this Court and muddy the specificity of the Miranda-Edwards rule. See Arizona v. Roberson, 487 U.S. at 682 (rejecting the argument that the Miranda-Edwards rule "should not apply when the police-initiated interrogation following a suspect's request for counsel occurs in the context of a separate investigation."); Minnick v. Mississippi, 111 S.Ct. at 491 (clarifying Edwards' intent that "when counsel is requested, interrogation must cease, and officials may not reinitiate interrogation without counsel present, whether or not the accused has consulted with his attorney."); see also App. A, infra, 7a (D.C. Court of Appeals opinion in this case, affirming Miranda-

Edwards rule's application to this case). This Court has addressed this issue in the past and has ruled that the accused's right to have counsel present is not satisfied merely because the accused has had a prior opportunity to speak with counsel. The accused's request for counsel at interrogation serves as a request to be represented by an agent in dealing with law enforcement authorities. The agency relationship is not satisfied when the accused's right to representation is intermittent and beyond his influence. Moreover, consultation is not always effective in instructing the accused of his rights. Minnick v. Mississippi, 111 S.Ct. at 490-91. In sum, once the Fifth Amendment right to counsel is invoked, the accused has the right to have counsel **present** at police interrogation unless by his or her own unfettered activity, the accused waives that right. Id.

4. The Government also asserts that the Miranda-Edwards rule causes confusion in federal and state courts. In doing so, the Government cites pre-Minnick cases and compares them with post-Minnick cases. See Gov't's Petition at 13 (comparing pre-Minnick cases United States v. Hall, 905 F.2d 959, 962-63 (6th Cir.1990), cert. denied, 111 S.Ct. 2858 (1991), and State v. Newton, 682 P.2d 295, 297-98 (Utah 1984) with post-Minnick cases Kochutin v. State, 813 P.2d 298 (Alaska 1991); Walker v. State,

573 So.2d 415 (Fla.Dist.Ct.App.1991); and Commonwealth v. Perez, 581 N.E.2d 1010 (Mass.1991)). The inconsistency of which the Government alerts this Court was settled in 1990. See Minnick v. Mississippi, 111 S.Ct. 486 (1990); Kochutin v. State, 813 P.2d 298 (Alaska 1991); Walker v. State, 573 So.2d 415 (Fla.Dist. Ct.App.1991); Commonwealth v. Perez, 581 N.E.2d 1010 (Mass. 1991). Despite the Government's assertion, the courts do not appear to need a restatement of the Miranda-Edwards rule.

CONCLUSION

Because the Miranda-Edwards rule has evolved as a bright-line rule protecting the accused and the public from coerced confessions, and because this case demonstrates the desirability of that bright-line rule, Respondent asserts that the wisdom of the existing rule should be maintained and that certiorari to the District of Columbia Court of Appeals should be denied.

Respectfully submitted,

Joseph R. Conte
Member of the Bar of this Court
Appointed for Respondent

April, 1992

NO.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

PROOF OF SERVICE

I, Joseph R. Conte, do swear or declare that on this date, April 24, 1992, pursuant to Supreme Court Rules 29.3 and 29.4, I have served the attached RESPONSE TO A PETITION FOR WRIT OF CERTIORARI on each party to the above proceeding, or that party's counsel, and on every other person required to be served by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid.

The names and address of those served are as follows:

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APPENDIX A:

United States Court of Appeals' Findings

ADDENDUM

Appendix A:
District of Columbia Court of Appeals' Findings

Appendix B:
D.C. Superior Court's Findings
B(i): November 28, 1990 Initial Findings
B(ii): December 4, 1990 Final Findings

Appendix C:
Trial Record References

APPENDIX A

DISTRICT OF COLUMBIA
COURT OF APPEALS

No. 91-29

UNITED STATES, APPELLANT

v.

LOWELL GREEN, APPELLEE

Argued April 17, 1991

Decided May 31, 1991

Before ROGERS, Chief Judge, and STEADMAN and FARRELL, Associate Judges.

FARRELL, Associate Judge:

The government appeals from an order suppressing the confession of appellee (hereafter defendant) in this murder prosecution. The trial judge ruled that the police, in eliciting the confession, violated the prophylactic rule of *Edwards v. Arizona*, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981), as further explained in *Minnick v. Mississippi*, —— U.S. ——, 111 S.Ct. 486, 112 L.Ed.2d 489 (1990). The government argues that suppressing the confession in this case amounts to a wholly unwarranted extension of the *Edwards* rule to circumstances presenting none of the concerns that impelled that decision or its sire, *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16

L.Ed.2d 694 (1966). The government's argument has force, as the trial judge recognized; but like the trial judge we conclude that the Supreme Court's teachings in this area so far do not countenance a departure from the "bright-line" rule of *Edwards* in the present circumstances. We therefore uphold the suppression of defendant's confession.

I.

Defendant originally was arrested on July 18, 1989, on a charge of possessing a controlled substance with intent to distribute. He signed a police advice-of-rights (PD 47) form that day and answered "No" in writing to the question whether he was willing to answer questions without having an attorney present. Defendant was presented in court the next day and an attorney was appointed to represent him. He was held on bond until July 28, 1989, when the drug case was dismissed at preliminary hearing. It appears that he was then remanded to the custody of juvenile authorities, presumably in connection with a juvenile matter pending against him at the time. He was subsequently indicted on the drug charge, but failed to appear for his arraignment on August 22, 1989, apparently because he was in the custody of juvenile authorities. When eventually located, he was arraigned in the drug case on September 7, 1989. A bond was imposed and he remained in custody on the bond until September 27, 1989, when he pled guilty to the lesser included offense of attempted possession with intent to distribute cocaine. Following the plea, he was held in the Youth Center at the Lorton Reformatory while a Youth Act Study (D.C.Code § 24-803(e) (1989)) was conducted. On February 26, 1990, he was sentenced to fifteen months' incarceration under the Youth Act.

Meanwhile, on January 4, 1990, while defendant was at Lorton, Detective Donald Gossage of the Metropolitan Police Department obtained an arrest warrant charging him with the murder of Cheaver Herriott on December 30, 1988. Also on January 4, Detective Gossage obtained an order directing that defendant be brought up the next day from the Youth Center to be booked and formally presented on the murder warrant. On January 5, defendant was brought to the police Homicide Office to be booked. Detective Gossage advised him of his *Miranda* rights by reading to him both sides of the PD 47 form. Defendant chose to waive his *Miranda* rights, so indicating by his answers to four questions on the form. After he discussed with Gossage his involvement in the murder of Cheaver Herriott, defendant was again advised of his rights and agreed to make a videotaped statement, in which he confessed involvement in the robbery and killing of Herriott.

Following his indictment on April 17, 1990 on various charges including first-degree murder, defendant moved to suppress his confession on several grounds, chief among them that it had been obtained in violation of *Edwards v. Arizona*, *supra*, in view of his original refusal—at the time of his arrest on the drug charge—to answer questions without counsel being present. The trial judge heard testimony and initially denied the motion to suppress, concluding that "none of the reasons which underlie [the Supreme] Court's decision[s] which have addressed a criminal defendant's right to [counsel] under the 6th Amendment and his right not to incriminate himself under the 5th Amendment[] would be served by suppression" of defendant's murder confession.[1] The judge em-

[1] The government argues, and we agree, that this case presents no issue of violation of defendant's right to counsel under the Sixth Amendment. *See, e.g., Illinois v. Perkins*, —— U.S. ——, 110 S.Ct. 2394, 2399, 110 L.Ed.2d 243 (1990); *United States v. Gouveia*, 467 U.S. 180, 187-88, 104 S.Ct. 2292, 2296-98, 81 L.Ed.2d 146 (1984); *Woodson v. United States*, 488 A.2d 910, 912 (D.C. 1985).

phasized three points. First, an "extraordinary amount of time [over five months] . . . [had] elapsed between" defendant's invocation of rights in the drug case and his waiver of rights in connection with his confession to murder. Second, although he was under some form of restraint of liberty during the entire five or more months, during the last part of that period he was not being held in jail but rather in the presumably less coercive environment of the Youth Center. Finally, defendant had had the opportunity to consult repeatedly with counsel during the period between his invocation of rights in the drug case and his waiver of rights before his murder confession.

Three days after the court's initial ruling, however, the Supreme Court decided *Minnick v. Mississippi*, *supra*. The judge reconsidered his ruling on the Fifth Amendment issue in light of *Minnick*, noting in particular that the "most significant[]" ground of his ruling had been the appointment of counsel and the opportunity defendant had had to consult counsel in the months prior to the reinitiation of questioning by the police—a factor specifically addressed by *Minnick*, and held not to justify a departure from *Edwards*. On the strength of *Minnick*'s specific holding and its reaffirmation of the "bright-line" test established by *Edwards*, the judge reversed his earlier ruling and ordered the confession suppressed.[2] The government

[2] The trial judge adhered to his previous rejection of defendant's claims that his confession was involuntary in fact

noted this timely appeal. D.C.Code § 23-104(a)(1) (1989).

II.

In *Edwards v. Arizona* the Supreme Court held:

> [W]hen an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation, even if he has been advised of his rights. . . . [A]n accused, . . . having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police.

Edwards, 451 U.S. at 484-85, 101 S.Ct. at 1884-85. "Preserving the integrity of an accused's choice to communicate with police only through counsel is the essence of *Edwards* and its progeny." *Patterson v. Illinois*, 487 U.S. 285, 291, 108 S.Ct. 2389, 2394, 101 L.Ed.2d 261 (1988). The Court has further explained that "[t]he merit of the *Edwards* decision lies in the

and that it was obtained during an unnecessary delay in bringing defendant to court. *See Mallory v. United States*, 354 U.S. 449, 77 S.Ct. 1356, 1 L.Ed.2d 1479 (1957); 18 U.S.C. § 3501 (1988). On appeal defendant does not argue the constitutional involuntariness of the confession as an alternative ground supporting the suppression ruling. He does raise the issue of unnecessary delay, but we reject that claim as did the trial judge. *Bliss v. United States*, 445 A.2d 625, 633 (D.C. 1982), *cert. denied*, 459 U.S. 1117, 103 S.Ct. 756, 74 L.Ed.2d 972 (1983). *See* Super.Ct.Crim.R. 5(a).

clarity of its command and the certainty of its application," *Minnick*, 111 S.Ct. at 490: "the *Edwards* rule provides 'clear and unequivocal' guidelines to the law enforcement profession," *id.* (citation and additional internal quotation marks omitted), and it "conserves judicial resources which would otherwise be expended in making difficult determinations of voluntariness." *Id.* at 489.

The government, while acknowledging these purposes of the rule, reminds us that the *Edwards* holding, like the seminal rule of *Miranda*, "is not itself required by the Fifth Amendment's prohibition on coerced confessions, but is instead justified only by reference to its prophylactic purpose." *Connecticut v. Barrett*, 479 U.S. 523, 528, 107 S.Ct. 828, 832, 93 L.Ed.2d 920 (1987). The government points to the Court's statement that "*Edwards* is designed to prevent police from badgering a defendant into waiving his previously asserted *Miranda* rights," *Minnick*, 111 S.Ct. at 489 (quoting *Michigan v. Harvey*, 494 U.S. 344, ——, 110 S.Ct. 1176, 1180, 108 L.Ed.2d 293 (1990)); "[t]he rule ensures that any statement made in subsequent interrogation is not the result of coercive pressures." *Id.* The government then mounts a multipronged case for holding that the circumstances of this case insure both that defendant was not "badgered" into revoking his initial election to communicate with police only through counsel and that "the coercive pressures of custody were not the inducing cause" of his confession. *Id.* at 492.

First, the government points out that the police reinitiated questioning only after defendant had been furnished counsel and consulted with him in the drug case, and that the renewed questioning concerned a crime entirely unrelated to the one regarding which

defendant had refused to talk without counsel.[3] These considerations alone cannot support the government's argument. In *Arizona v. Roberson*, 486 U.S. 675, 108 S.Ct. 2093, 100 L.Ed.2d 704 (1988), the Court rejected the argument that the *Edwards* rule "should not apply when the police-initiated interrogation following a suspect's request for counsel occurs in the context of a separate investigation," *id.* at 682, 108 S.Ct. at 2098; "unless he otherwise states, there is no reason to assume that a suspect's state of mind is in any way investigation-specific" when, by requesting an attorney, he has demonstrated his belief "that he is not capable of undergoing [custodial] questioning without advice of counsel." *Id.* at 684, 108 S.Ct. at 2099 (citations omitted), at 681, 108 S.Ct. at 2097. Here, defendant's insistence on answering questions only with counsel present was unqualified. *Compare Roberson* with *Connecticut v. Barrett*, *supra*.

Similarly, in *Minnick* the Court clarified *Edwards*' intent that "when counsel is requested, interrogation must cease, and officials may not reinitiate interrogation *without counsel present*, whether or not the accused has consulted with his attorney." 111 S.Ct. at 491 (emphasis added). The Court rejected the argument that an intervening "opportunity to consult with an attorney outside the interrogation room" was sufficient. *Id.* at 490. In this case it is undisputed that defendant did not have counsel present when Detective Gossage reinitiated questioning.

The government endeavors to narrow *Roberson* and *Minnick* to their individual settings. As in *Edwards* itself, it says, the accused in *Roberson* was

[3] Defendant does not dispute that the drug offense to which he pled guilty was factually unrelated to the December 1988 murder that was the subject of his confession.

"denied the counsel he [had] clearly requested" until after the police reinitiated interrogation. 486 U.S. at 686, 108 S.Ct. at 2100. As in *Edwards* too, *Minnick* involved questioning about the same offense which the accused had refused to discuss without counsel being present. The absence of both these factors in this case, the government submits, takes it outside the reach of *Edwards* and its progeny; in particular, as the trial judge found, defendant had had repeated opportunity to consult counsel before the police approached him about the murder. But if *Edwards*, *Roberson* and *Minnick* together teach anything, it is the need for great caution in finding distinctions among cases all involving the paradigmatic original request by the accused for counsel, reflecting "his own view that he is not competent to deal with the authorities without legal advice," *Roberson*, 486 U.S. at 681, 108 S.Ct. at 2098 (citation omitted). The Supreme Court having made clear that police-initiated questioning about a separate offense and questioning after opportunity to consult counsel each fails to justify departure from *Edwards*' "bright-line, prophylactic . . . rule," *id.* at 682, 108 S.Ct. at 2098, we are not convinced that in combination the Court would regard these two factors differently.

The government next distinguishes the *Edwards* line of cases based upon the sheer length of time between defendant's invocation of the right to counsel and the initiation of questioning about the unrelated homicide offense. There is no question that to the extent *Edwards* is "designed to prevent police from badgering a defendant into waiving his previously asserted *Miranda* rights," *Minnick*, 111 S.Ct. at 489,[4]

[4] "[T]he coercion inherent in custodial interrogation derives in large measure from an interrogator's insinuations

that danger is reduced when the police have made no effort to interrogate the defendant for more than five months after his assertion of rights. *Edwards*, the government argues, rests on the assumption that repeated attempts to initiate questioning will "exacerbate" the "compulsion to speak" already felt by one "who has indicated his inability to cope with the pressures of custodial interrogation by requesting counsel," *Roberson*, 486 U.S. at 686, 108 S.Ct. at 2100; and that compulsion must be substantially lessened when the police have avoided all efforts to question the person without counsel for so long a period of time.

These are substantial arguments, but there are weighty considerations on the other side of the ledger as well. Although the trial judge attached significance to the fact that defendant apparently was in the presumably less coercive environment of the Youth Center during much of the five to six-month period, the government concedes on appeal "that defendant in this case was in continuous custody for purposes of the *Edwards* prophylactic rule" (Brief for Appellant at 21 n. 16).[5] In *Minnick*, although the

that the interrogation will continue until a confession is obtained." *Minnesota v. Murphy*, 465 U.S. 420, 433, 104 S.Ct. 1136, 1145, 79 L.Ed.2d 409 (1984) (citing *Miranda*, 384 U.S. at 468, 86 S.Ct. at 1624).

[5] That concession, which as we understand it relinquishes any argument based on differing degrees of coerciveness in the custodial environment for purposes of this appeal, is probably well-advised. Although courts have recognized that different kinds of custody can be more or less coercive with regard to the possibility of self-incrimination, *see Smith v. United States*, 586 A.2d 684, 685 (D.C. 1991), the record in this case contains sparse indication of the circumstances in which defendant's liberty was restrained at the Youth Center,

relevant interval was only a matter of days, the Court emphasized "the coercive pressures that accompany custody and that may *increase* as custody is prolonged." 111 S.Ct. at 491 (emphasis added).[6] Moreover, except for his ongoing contacts with his custodial caretakers, we must assume that defendant's only contact with law enforcement officials (investigators and prosecutors) during this period was through, or in the presence of, his attorney. Hence there is nothing in the lapse of time itself from which to deduce that his original belief in his vulnerability to the pressures of custodial interrogation had diminished as he progressed through the steps of pleading guilty to the (lesser included) offense of attempted drug distribution; it is just as likely that his sense of dependence on, and trust in, counsel as the guardian of his interests in dealing with government officials intensified.

Furthermore, with the government's argument based upon the lapse of time we are again met with the Supreme Court's insistence that the *Edwards* rule be kept "clear and unequivocal." If five months in custody without evidence of police "badgering" is held sufficient to dispel *Edwards*' presumption that any new waiver of rights is involuntary, then why not three months or three weeks? At what point in time—and in conjunction with what other circum-

an issue on which the government—with superior knowledge of the circumstances—presumably bore the burden of production, if not proof, below.

[6] *See also Arizona v. Roberson*, *supra*, 486 U.S. at 686, 108 S.Ct. at 2100 (pointing to the "serious risk that the mere repetition of the *Miranda* warnings would not overcome the presumption of coercion that is created by prolonged police custody").

stances—does it make doctrinal sense to treat the defendant's invocation of his right to counsel as countermanded without any initiating activity on his part? The government is candid in admitting that a focus on the lapse of time—three days versus three weeks versus three or five months—risks obscuring *Edwards*' lucid rule, but argues that this reversion to *some* sort of case-specific consideration of circumstances is inevitable if *Edwards* is not to become a caricature of itself on facts such as presented here. In his dissent in *Minnick* Justice Scalia likewise scorned what he termed the "perpetual irrebutable presumption" erected by *Edwards* and its progeny, necessitating the same result if the intervening period "had been three months, or three years, or even three decades." 111 S.Ct. at 496.[7] Ultimately, given its emphasis on the need for a bright-line rule in this area, we think only the Supreme Court can explain whether the *Edwards* rule is time-tethered and whether a five-month interval, during which no efforts at custodial interrogation took place, is too long a period to justify a continuing irrebuttable presumption that any police-initiated waiver was invalid. Until the Court provides further guidance, we are persuaded that so long as

[7] *Amicus* the Public Defender Service points out that even if *Edwards*' presumption of involuntariness is unaffected by the passage of time or later events, it rationally "can apply only to crimes which have already occurred [and not to future crimes,] since the suspect cannot possibly be asserting a right to refuse to answer questions which could not possibly be posed." PDS thus disputes the notion that the *Edwards* rule, unless in some way time-restricted, admits of no "reasonable limiting principle." The government essentially replies that this limitation to crimes already committed is small comfort to "the public's [legitimate] interest in the investigation of criminal activities." *Maine v. Moulton*, 474 U.S. 159, 180, 106 S.Ct. 477, 489, 88 L.Ed.2d 481 (1985).

the defendant remains in custody the fact that the police did not reinitiate interrogation until five months after he invoked his right to counsel cannot be adequate reason, alone or combined with the factors already treated, to justify a departure from *Edwards*' command.[8]

The government, however, has saved what might seem to be its most potent argument until last, one that promises adherence to the requirement of some form of bright-line rule. Although defendant was still in custody awaiting sentencing when the police reinitiated questioning, he had pled guilty months earlier in the drug case that caused his arrest and invocation of rights. As the government points out, *Edwards* itself does not make its prophylactic ban permanent: the accused can lift it by reinitiating conversation with the police about the crime. Similarly, several courts have held that *Edwards*' presumption of involuntary waiver fades when the accused is released from custody.[9] The government urges that, so too, "the defendant's knowing, voluntary, and intelligent decision [here], arrived at with the advice of counsel, to plead guilty to the drug offense represents a break in events sufficient to sever

[8] Strictly speaking, we have no occasion to decide whether different considerations would come into play if the defendant, although still in custody, were transferred to the general prison population following imposition of sentence. Appellant remained in custody pending sentence on the drug charge at the time the police approached him about the murder.

[9] *E.g., Dunkins v. Thigpen*, 854 F.2d 394, 397 (11th Cir. 1988), *cert. denied*, 489 U.S. 1059, 109 S.Ct. 1329, 103 L.Ed.2d 597 (1989); *United States v. Skinner*, 667 F.2d 1306, 1309 (9th Cir. 1982), *cert. denied*, 463 U.S. 1229, 103 S.Ct. 3569, 77 L.Ed.2d 1410 (1983); *People v. Trujillo*, 773 P.2d 1086, 1091-92 (Colo. 1989) (en banc).

any link between the defendant's invocation of his *Miranda* right to counsel in connection with the drug case and police interrogation about the entirely separate crime of murder." Just as the prosecution may show "a sufficient break in events to undermine the inference that [a] confession was caused by [a] Fourth Amendment violation," *Oregon v. Elstad*, 470 U.S. 298, 306, 105 S.Ct. 1285, 1291, 84 L.Ed.2d 222 (1985), so the knowing, voluntary and intelligent waiver of Fifth Amendment protections represented by a presumptively valid guilty plea undermines the assumption that a subsequent waiver of *Miranda* rights was the product of police coercion.

There is no question that defendant's intervening plea of guilty distinguishes this case factually from *Edwards* and succeeding cases, and it is also true that in important respects "a guilty plea represents a break in the chain of events which has preceded it in the criminal process." *Tollett v. Henderson*, 411 U.S. 258, 267, 93 S.Ct. 1602, 1608, 36 L.Ed.2d 235 (1973). Nevertheless, we must decide whether by pleading guilty in the drug case defendant can be said to have "reopened the dialogue with the authorities" within the meaning of *Edwards*, 451 U.S. at 486 n. 9, 101 S.Ct. at 1885, n. 9, so as to validate his waiver of rights and interrogation on the murder charge. Defendant points out that he retained his privilege against self-incrimination on the drug charge until sentencing,[10] but that fact is not decisive; the police had little interest in gathering additional evidence of the drug charge. Rather, the answer is implicit in our foregoing discussion. Defendant pled guilty with the advice and assistance of coun-

[10] *See Estelle v. Smith*, 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981); *Boswell v. United States*, 511 A.2d 29 (D.C. 1986).

sel. Hence while the knowing and voluntary plea presumably demonstrated that acceptance of personal responsibility and not the pressures of custody caused him to incriminate himself, it also was consistent with his original election to deal with government officials only through an attorney. Indeed, from defendant's viewpoint the fact that counsel had negotiated a plea to a lesser charge sparing him a mandatory-minimum sentence, D.C. Code § 33-541(c)(1)(A) (1990 Supp.), would only have confirmed the wisdom of his choice to insist on the shield of legal representation. If defendant had other criminal involvement to conceal, or if he merely feared that he would be wrongly implicated in crimes committed by someone else, in either case we must assume he chose the shelter afforded by *Miranda* and *Edwards* to insure that the coercive pressures of custody did not cause him to incriminate himself. Defendant's plea of guilty in the drug case, because it is consistent with his election to communicate with the police only through counsel, cannot be the pivotal break in events that *Edwards* demands before a waiver can be regarded as an initial election by the accused to deal with the authorities on his own.

III.

The *Edwards* rule, like the rule of *Miranda* itself, remains "an auxiliary barrier against police coercion," *Connecticut v. Barrett*, 479 U.S. at 528, 107 S.Ct. at 832 (emphasis added). Hence it is not unfair to question the logic of a presumption that renders invalid an otherwise knowing, intelligent and voluntary waiver of *Miranda*'s auxiliary protections—and so demands exclusion of a murder confession voluntary in fact—because over five months earlier, in connection with an unrelated crime, the defendant

asked for (and was afforded) the assistance of counsel. But this Court's task is to construe the teachings of the Supreme Court as faithfully as it can in constitutional matters. In this case we have tried not to rely merely on "broad language" in *Edwards*, *Roberson* and *Minnick* which the government admits tends to neutralize the distinguishing features of this case,[11] but instead to ask whether, fundamentally, the Court would regard the custodial circumstances of this case as presenting a "situation[] in which the concerns that powered [both *Miranda* and *Edwards*] are implicated." *Berkemer v. McCarty*, 468 U.S. 420, 437, 104 S.Ct. 3138, 3149, 82 L.Ed.2d 317 (1984). In *Minnick* the Court summarized those concerns and purposes, stated that "[t]he *Edwards* rule sets forth a specific standard to fulfill these purposes," and admonished that "we have declined to confine [the rule] in other instances," *Minnick*, 111 S.Ct. at 492 (citing *Roberson*). On balance, we are left unpersuaded that the Court would confine it in the present situation either, despite the accumulation of distinguishing features the government can point to. If that judgment is wrong, then it is for the Court in this case or some future one to provide the *Leitfaden*—the red thread—through its decisions leading to the correct result.

The order suppressing defendant's confession is

Affirmed.

[11] In general, the Supreme Court has cautioned that "words of . . . opinions are to be read in the light of the facts of the case under discussion. . . . General expressions transposed to other facts are often misleading." *Armour & Co. v. Wantock*, 323 U.S. 126, 133, 65 S.Ct. 165, 168, 89 L.Ed. 118 (1944); *see also Air Courier Conference of America v. American Postal Workers Union*, —— U.S. ——, 111 S.Ct. 913, 920, 112 L.Ed.2d 1125 (1991).

STEADMAN, Associate Judge, dissenting:

The bottom-line issue in this appeal is the degree to which the rule of *Edwards* and its progeny is to extend durationally beyond the paradigm situation involved in those cases: prearraignment continuous custody by arresting officers. *See Minnick v. Mississippi*, —— U.S. ——, 111 S.Ct. 486, 492, 112 L.Ed.2d 489 (1990) ("[w]e are invited by this formulation to adopt a regime in which *Edwards*' protection could pass in and out of existence multiple times prior to arraignment, at which point the same protection might reattach by virtue of our Sixth Amendment jurisprudence").

As reiterated in *Minnick*, the protection of *Edwards* is "designed to prevent police from badgering a defendant into waiving his previously asserted *Miranda* rights," and "to ensure that any statement made in subsequent interrogation is not the result of coercive pressures." 111 S.Ct. at 489 (citation omitted). It seems to me that the government is correct in its assertion that when an event occurs which represents a sea change in those circumstances which existed at the time the right to counsel was originally invoked, the irrebuttable presumption against a voluntary waiver of the *Miranda* right to counsel should likewise cease. I believe the Supreme Court would so rule.[1] *Cf. Oregon v. Elstad*, 470 U.S. 298, 306, 105 S.Ct. 1285, 1291, 84 L.Ed.2d 222 (1985) (prosecution may show "a sufficient break in events to undermine the inference that [a] confession was caused by [a] Fourth Amendment violation"); *Miranda v.*

[1] I recognize that Justice Scalia in his dissent in *Minnick* characterizes the majority as announcing a "perpetuality of prohibition", 111 S.Ct. at 496, but that interpretation does not, of course, speak for the full court.

Arizona, 384 U.S. 436, 496, 86 S.Ct. 1602, 1639, 16 L.Ed.2d 694 (1966) (requirement of a break in the stream of events).

It is conceded that *Minnick* constitutes no bar to questioning about a crime occurring *subsequent* to the invocation of the right to counsel. Far short of that, a number of cases have recognized that where a suspect has been released from custody and subsequently again detained, even for the same crime, an invocation of the right to counsel during the original confinement does not prevent the police from seeking a waiver of such a right upon the new confinement. *See, e.g., Dunkins v. Thigpen*, 854 F.2d 394, 397 (11th Cir.1988), *cert. denied*, 489 U.S. 1059, 109 S.Ct. 1329, 103 L.Ed.2d 597 (1989); *United States v. Skinner*, 667 F.2d 1306, 1309 (9th Cir.1982), *cert. denied*, 463 U.S. 1229, 103 S.Ct. 3569, 77 L.Ed.2d 1410 (1983).[2]

Similarly, I believe that the government is correct in its assertion that when a defendant has pled guilty to the charge which prompted the invocation of the right to counsel, circumstances have so significantly changed that any coercive effect created by the original confinement must be deemed to have been dissipated, certainly with respect to questioning about an entirely separate and distinct crime. A suspect's concern about self-incrimination that may exist during pre-trial detention must be dramatically affected once, with the advice and assistance of counsel and subject to the elaborate protections provided by Rule

[2] Here, for several months following his invocation of the right to counsel, appellant as a juvenile was apparently held not in any jail or prison as such but rather was in the custody of juvenile authorities. Nonetheless, the government for purposes of this appeal assumes that the appellant was in continuous custody for purposes of the *Edwards* prophylactic rule, and I deal with the appeal on that basis.

11, he has appeared in court and been convicted from his own mouth. Such an event entailing a knowing, voluntary and intelligent waiver of the Fifth Amendment right against self-incrimination and its consequent concerns—the very right that *Edwards* seeks to protect—should undermine any irrebuttable presumption that a subsequent waiver directed toward an entirely unrelated crime is the product of continuing police coercion. I would so hold.

APPENDIX B:

D.C. Superior Court's findings
B(i): November 28, 1990 Initial Findings
B(ii): December 4, 1990 Final Findings

APPENDIX B(i)

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CRIMINAL DIVISION

Criminal Action No. F 265-90

UNITED STATES OF AMERICA

vs.

LOWELL GREEN, DEFENDANT

Washington, D. C.

Wednesday, November 28, 1990

The above-entitled action came on for a motions hearing before the Honorable HENRY KENNEDY, Associate Judge, in Courtroom Number 102 commencing at approximately 11:40 a.m.

APPEARANCES:

On behalf of the Government:

LISA PRAGER, Esquire
Assistant United States Attorney

On behalf of the Defendant:

JOSEPH CONTE, Esquire
Washington, D. C.

• • • • •

THE COURT: The matter presently before the Court is the Defendant's Motion to Suppress the statements which the Government indicates it wishes to use as evidence in this case, some of which were videotaped on January 5th, 1990.

The Court has reviewed the papers filed in connection with this motion and considered the argument of Counsel and has had an opportunity to consider the testimony of the witnesses.

Initially the Court knows that its ruling as to whether Mr. Green's statement was given voluntarily and after being given and then waiving his Miranda Rights depends upon its assessment as to the credibility of the witnesses.

There are only three possible alternatives as to what happened after Mr. Green was brought to the Homicide Office of the Metropolitan Police Department shortly after eleven o'clock a.m. on January 5th, 1990.

Mr. Green's account, Detective Gossage's account or a scenario which might emerge from the different accounts of the two.

The Court has no reason to discern a scenario which is different from that of Mr. Green and Detective Gossage. And as between those two accounts, that is the account given by Mr. Green and Detective Gossage, the Court credits Detective Gossage's account for the following reasons and based upon the following factors.

One. Nothing which he said is inherently [in]-credible. Two. While Detective Gossage does have a professional interest in this case and indeed, is in the business of ferr[e]ting out crime as he had been in January of 1990 for seventeen years, that interest pales when compared with the interests of Mr. Green in giving testimony which would serve his interests

in having this very damaging piece of evidence, or pieces of evidence, suppressed.

Three. Mr. Green has been previously convicted of a crime, a fact which the Court may and does consider in assessing his credibility.

And four, the evidence which is present for all to see and hear which contradicts some of Mr. Green's sworn testimony at the Motions Hearing.

For example, when questioned at the motions hearing whether he had received lunch at the police station he indicated unequivocably that he had not.

This conflict[s] absolutely and without explanation with his statement made on the videotape that he had been given lunch. At the motions hearing Mr. Green was questioned as to whether he was threatened, he indicated that he had been.

The threats, I suppose, that are being referred to is the threat of receiving—being charged with two offenses unless he gave a statement.

On the videotape, while it's not quite so clear as to what was meant and so it's not as clear[ly] in conflict as the testimony concerning the giving of the lunch, he testified that he had not been threatened.

The Court has reviewed the deposition of Ms. Mary Taylor and with respect to that testimony simply does not attach the same significance to it as Mr. Green does.

In any event, it's clear that Ms. Taylor is not able to [in]voke either Mr. Green's 5th or 6th Amendment right no[r] to have Counsel. Having made this credibility finding which leads the Court to conclude that Mr. Green was brought to the Homicide Office of the police department, was given his Miranda Rights in the way in which Detective Gossage testified they were given on the stand, that Mr. Green understood

his rights and that he appreciated them and thereafter waived them, the Court finds no basis to suppress any of these statements on the ground that they were given in violation of Miranda or were involuntarily made.

To move to the next prong of the Defense argument, the Court is of the view that a very very serious question is raised as to whether these statements should be suppressed as a result of the Supreme Court holdings in Roberson vs. Arizona, unlike the case of Espinosa, to which reference has been made, sets forth controlling preceden[t] for this Court.

Roberson vs. Arizona—Arizona vs. Roberson extended the rule of Arizona vs. Edward[s] which held that a suspect who has "expressed his desire to deal with the police only through Counsel is not subject to further interrogation by the authorities until Counsel has been made available to him unless the accused himself initiates further communications."

In Roberson, the accused was arrested on the scene for a just completed burglary and indicated that he did not wish to speak with the authorities without a lawyer.

Three days later while the accused was still in custody pursuant to the arrest three days earlier, a different police officer inquired about another burglary that had been committed the day before the suspect was arrested.

This officer, that is, the second interrogating officer, had given the Defendant his Miranda rights which presumably were effective in the absence of the Supreme Court's ruling that the giving of the rights w[as] ineffective as a matter of law.

To advise the Defendant of his rights under the 5th and 6th Amendment the Supreme Court held that

the rule which it had laid down in Arizona vs. Edwards applied and required suppression of the Defendant's statement. And the fact that the subsequent interrogations by the police concern[ed] an offense unrelated to the prior offense about which the suspect refused to speak without a lawyer, or that the second interrogating official did not know that the suspect had earlier requested a lawyer before speaking with the police, did not matter.

The Court emphasized the fact that the presumption raised by a suspect's request for Counsel that he considers himself unable to deal with the procedures of custodial interrogation without legal assistance does not disappear simply because the police ha[ve] approached the suspect still in custody, still without Counsel, about a separate investigation.

In this Court's view the provision of Counsel to Mr. Green prior to his interrogation in this case is a significant and dispositive factual distinction which leads the Court to find that Arizona vs. Roberson does not require suppression of the statement.

The precise holding of Roberson is that a criminal suspect who has expressed a desire to deal with the police only through Counsel is not subject to further interrogation even with respect to a subsequent unrelated offense by the authorities until Counsel has been made available to the suspect or unless the suspect initiates further communications.

The Court admits that there are broad statements of law set forth in Roberson which if followed to the letter would require suppression of the Defendant's statement in this case.

For example, the Supreme Court discussed at length the case of Edward[s] vs. Arizona. The Court in Roberson noted that in Edwards it reconfirmed the view which it had expressed in Miranda, the views

expressed—its views expressed in Miranda and to lend substance to such views "emphasized that it is inconsistent with Miranda and its progeny for the authorit[ities] at their instance to reinterrogate an accused in custody if he has clearly asserted his right to Counsel.

We concluded that interrogations may only occur if the accused himself only initiates further communication."

The Court also expressed "that if a suspect believes that he is not capable of undergoing such questioning without advice of Counsel, then it is presumed that any subsequent waiver that has come at the authorities['] bequest and not the suspect's own instigation is itself the product of the inherently compelling pressures and not the purely voluntary choice of the suspect."

Moreover this Court, as it stated during the course of argument in this case, is given reason to pause by the d[iss]ent of Justice Kennedy in the Roberson case which anticipated precisely the significance of the majority decision in Roberson for the factual scenario which is presented here.

A[c]knowledging its concern, the Court is reminded of the words of our Court of Appeals in the case of Craft vs. Craft and the Supreme Court's decision in Armour vs. Waintok, Craft vs. Craft, Armour vs. Waintok. Neither of these are criminal cases, the cites are Craft vs. Craft, 155 At.2d. 910, a 1959 case. Armour, A-r-m-o-u-r and Company vs. Waintok, 323 U.S. 126, a 1944 case.

"It is well to remember that significance is given to broad and general statements of law only by comparing the facts from which they arise with those facts to which they supposedly apply.["]

The record in this case memorializes the great difference between the factual scenario in Roberson and that of the case at bar. Among those are one, the extraordinary amount of time which elapsed between Mr. Green's invocation of his desire to speak only with Counsel present in July of 1989 and the subsequent waiver of such right—in excess of five months later in January of 1990.

Two. Unlike in Roberson, Mr. Green was not continuously in custody of the police and therefore arguably subject to the same coercive pressures in January 1990 as he was in July of 1989.

In fact, Mr. Green was in the custody of the Department of Corrections during the last portion of the time between July 1989 and January 5, 1990 and not with the police during the course of his testimony. Mr. Green gave some hint as to what his day-to-day life was like at the Youth Center.

That is, he was being studied for a Youth Act study. He had to get up to go to his programs. The point is that unlike the cases that have dealt with this issue, Arizona vs. Edwards and Roberson vs. Arizona, the Espinosa case and there are other cases none really on point as much on point as those that I have discussed, it simply cannot be said that there was the same type of custody.

But most important that it just can't be said that the same coercive pressures were at stake. But most significantly, of course, and the l[i]nch pin, it seems to me of the Court's decision in Arizona and the one which the Court finds dispositive in this case along with the others, is that Mr. Green in fact had been appointed an attorney in July of 1989 with whom he could have talked had he decide[d] to do so when he was asked in January of 1990 whether he was willing to talk with a lawyer.

The Court notes that the Supreme Court has never said that the investigative technique of questioning suspects is a tainted process. Under the facts of this case unless the technique itself is considered to be tainted, none of the reasons which underlie the Court's decision[s] which have addressed a criminal defendant's right to cancel [*sic*] under the 6th Amendment and his right not to incriminate himself under the 5th Amendment, would be served by suppression of these statements.

Moving on to the third prong of Mr. Green's argument in favor of suppression that his statements were taken in violation of 18 USC Code 3501C for [*sic*] D.C. Code, Section 140 and the principle set forth in the case of McNab[b] vs. United States and Mall[o]ry vs. United States.

The Court notes that the Defendant's argument in this regard depend[s] upon a finding that he was arrested at sometime other than when Detective Gossage informed Mr. Green that he was under arrest.

The Court is unable to be precise in its finding of when it is that Detective Gossage indicated that Mr. Green was under arrest. I simply failed to note it in my notes and do not have an independent recollection of when he said it was that he gave the specific time.

What he stated was that Mr. Green arrived at the Homicide Branch shortly—at 11 o'clock a.m. or shortly thereafter. That he exchanged what I would call a salutation with Mr. Green and told [him] that he would be with him later.

It is the Court's belief that Mr., based upon Detective Gossage's testimony, that Mr. Green was told that he was under arrest or was being placed under arrest about one-half to forty-five minutes later.

The Court is aware that the Rights Card was executed at 12:05, but I will go on and frankly, Counsel, if—I think you understand my ruling.

I credit Detective Gossage's testimony so it is what it is and so if there is in the record testimony as to when this man was placed under arrest, it speaks for itself. But I think that the Court announces of this will not—that it simply won't make any difference.

Even if the Court should determine that an arrest took place sometime prior to this time, that is, when Detecti[v]e Gossage says you are under arrest, it clearly would not have been before 10:17 a.m. when officers of the Metropolitan Police Department took Mr. Green from the custody of the United States Marshal service and it is clear that that is when the transfer took place.

The Court relies upon the—a paper which I don't know whether it bears a number or not which I think it should, but it's—it's a paper which has at the top United States—U.S. Department of Justice, United States Marshal Service, time out 10:17, and I do believe that this paper should be made part of the record, the Court has considered it.

It's at that time at the earliest, and the Court believes that it is probably the case that that is when the time should begin to run. It shouldn't be that an officer's statement, you are under arrest, provides the, you know, the time period.

It's that time when Mr. Green was taken into custody by the Metropolitan Police Department pursuant to an arrest warrant that had been previously sought and approved by a Judge.

Using the time of 10:17 at the earliest as a bench mark, Mr. Green began giving his statement after voluntarily waiving his rights not to speak at all or

without the presence of an attorney shortly after executing the PD47 at 12:05 p.m. within two hours of his arrest.

Having voluntarily beg[u]n his statement in the absence of Mr. Green's request to cease talking, the Court is unaware of any principle which would require the police to stop their questioning at 1:17 p.m. even if for the Court to determine that Title 4, D.C. Code Section 140 applies rather than 18 USC 3501C.

In the Court's view the videotaping was simply a continuation or memorialization of the same statement which Mr. Green gave to Detective Gossage that began sometime earlier. And again, the Court affixes that time at some time between 11:30 and 11:45.

With reference to the issue of which of the statutory provisions apply the Court would simply note that it is probable, it is probably the case the 18 USC 3501C rather than Title 4, Section 140 which applies in view of the fact that 350[1]-C is later in time and is the statutory provision which is specifically referred to [in] Rule 5A of this Court, the Court further doubts that the rule of lenity applies to the statute which governs the admissibility of evidence even if that evidence is evidence which [is] sought to be admitted in a criminal case as [im]pposed to statutes which set[] forth the elements of offenses and the punishment which might be opposed upon convictions of offenses.

The Court further notes that cases of United States vs. Pettyjohn which is good law in this jurisdiction hold that with respect to the Defendant's right to a speedy presentment before a magistrate, the Defendant's waiver of his 5th Amendment privilege also is a waiver of that right for the time, for that period of time when the statement is being made and that subsequent delay is not to be given retroactive effect.

The Court therefore denies for the reasons stated th[e] Defendant's Motion to Suppress the statements in this case. And while we are at this point, I believe it would be prudent to mark all of the matters to which the Court has indicated that it has taken into consideration but which perhaps formerly w[ere] not admitted into evidence.

I have in mind the booking order itself and the—I don't know what you would call this, it's a caption that reads, Prisoner Remand or Order to Receipt for United States Prisoner. That's at least what I would suggest.

The Court also, while it did not make reference to the form which sets forth the condition of release of Mr. Green in the July case, clearly indicates that he was appointed an attorney. At least that's what I believe should happen. I will hear what you have to say if you think not.

MR. CONTE: That's fine, Your Honor. My only problem is that I didn't know until—the issue of constant incarceration is just not an issue I was prepared to address. My client advises me that he was in fact in continuous incarceration from July 19th.

THE COURT: The record should be clear that that's what I had assumed.

MR. CONTE: The Court stated that he was not. I thought he was not either.

THE COURT: No, no, no, the Court assumes that from July 19, 1989 through January 5, 1990, he was in custody clearly, that is, that he was not free to go home.

The distinction the Court draws is between being in custody of the police, in the custody of the police, first of all, because he was not in the custody of the police, he was in the custody of the Department of Corrections and the kind of custody.

I mean, I just don't—this is a great case for great minds to draw these distinctions, you know. But it seems to me that it's a difference between always sitting at the jail three days, four days, and going down to the Youth Center, being talked with by psychiatrists, psychologists, and being involved in programs and so on and so forth.

That seems to me to be a different kind of custody. I did not mean to suggest or to find that Mr. Green was in—was free. That's not what the Court meant to say. All right. Anything else?

MS. PRAGER: No, Your Honor. I can't remember if Mr. Conte tendered the document or the Defense—it doesn't matter, we can have it marked as Government's or Defendant's exhibits. Mr. Conte knows which belongs to whom.

MR. CONTE: It does not matter for the record.

THE COURT: Let's call these Government's Exhibits and let's make sure that they are in the record and labeled correctly.

MR. CONTE: I suppose that the Rights Card from the July 19th, 1989 matter should be a part of the record and it's attached as an addendum in my motion.

THE COURT: Yes, I think that it should be. Do you have any objection to that?

MS. PRAGER: No, Your Honor.

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APPENDIX B(ii)

SUPERIOR COURT OF THE
DISTRICT OF COLUMBIA
CRIMINAL DIVISION

Criminal Action No. F265-90

UNITED STATES OF AMERICA

vs.

LOWELL GREEN, DEFENDANT

Washington, D. C.
Tuesday, December 4, 1990

The above-entitled action came on for trial before the Honorable HENRY H. KENNEDY, Associate Judge, in Courtroom Number 102, commencing at approximately 10:16 a.m.

APPEARANCES:

On behalf of the Government:

LISA PRAGER, Esquire
Assistant United States Attorney

On behalf of the Defendant:

JOSEPH R. CONTE, Esquire
Washington, D.C.

• • • • •

THE COURT: The Court is of the view that with the latest pronouncement from the Supreme Court, the highest Court of this land, given its interpreta-

tion of the decisions which preceded the case of *Arizona vs. Edwards*, that the decision requires suppression of the statement; that the Supreme Court has set up, as mandated, a bright, quote, unquote, bright line test, and that is one of the problems, in my view, of bright line tests. They kind of do not permit for the type of individual consideration of the facts which precedent, which do not set forth such bright lines permit.

The record is clear as to what the Court has found to be the case here. And I suppose what is required is that whenever a person is in custody, the police must check to see whether counsel has been appointed, and then before questioning that person, confer with counsel.

I believe that the Minnick Case requires this result, and so the Court reverses its ruling made on Friday and grants the motion, the defense motion to suppress the—all of the statements which were under consideration, both the oral statements to Detective Gossage, as well as the videotape memorialization of it. That's the Court's decision.

MS. PRAGER: Your Honor, given the Court's decision, the Government is requesting the 30-day continuance, which I believe we're entitled to to decide whether we're going to pursue an appeal.

THE COURT: All right. I don't have my calendar down here. Suggest a date in 30 days.

MR. CONTE: I would object, just for the record, Your Honor.

THE COURT: You object to?

MR. CONTE: I would object to any continuance. The jury is here. We haven't sworn them. We did request this Court swear the jury yesterday.

THE COURT: Yes. And I just smile, because,

boy, these rules are so complex. But, I think that the statute does permit the Government 30 days, does it not?

MS. PRAGER: Yes, Your Honor. And I think in this circumstance we can certainly—I'm personally certifying to the Court that the video taped statement is a substantial piece of evidence that the Government would use in its case-in-chief, and that this appeal, should it be taken, would not be taken for delay. And I think that with those representations, we are entitled to the 30-day continuance.

• • • • •

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APPENDIX C:

Trial Record References

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

CRIMINAL DIVISION

UNITED STATES OF AMERICA

vs. Criminal Action No. F 605-90

LOWELL GREEN,

Defendant

Washington, D. C.

Wednesday, November 28, 1990

The above-entitled action came on for a motions hearing before the Honorable HENRY KENNEDY, Associate Judge, in Courtroom Number 102 commencing at approximately 11:40 a.m.

THIS TRANSCRIPT REPRESENTS THE PRODUCT OF AN OFFICIAL REPORTER, ENGAGED BY THE COURT, WHO HAS PERSONALLY CERTIFIED THAT IT REPRESENTS HIS ORIGINAL NOTES AND RECORDS OF TESTIMONY AND PROCEEDINGS OF THE CASE AS RECORDED.

APPEARANCES:

On behalf of the Government:

LISA PRAGER, Esquire
Assistant United States Attorney

On behalf of the Defendant:

JOSEPH CONTE, Esquire
Washington, D. C.

RT

Mr. Robert L. Tanner
Official Court Reporter Telephone 879-1048

THE COURT: Does the Government have more evidence to present on this issue of the -- whether this tape can be shown to the jury?

MS. PRAGER: No, Your Honor, that concludes the Government's evidence.

THE COURT: Mr. Conte.

MR. CONTE: We call Lowell Green to the stand.

Thereupon,

LOWELL GREEN,

having been called as a witness for and on behalf of the Defendant, and having first been duly sworn by the Deputy Clerk, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. CONTE:

Q. Mr. Green, I am going to ask you to speak slowly and loudly enough so that everybody can hear you, okay?

A. Yes.

Q. Would you state your name for the record?

A. Lowell Michael Green, Jr.

Q. And where do you live?

A. 843 19th Street, N.E., apartment 3.

Q. And how long have you lived there?

A. Ten years.

Q. Okay. Mr. Green, I am going to draw your attention to January 5th, 1990. Do you recall where you

were at that date?

A. Yes.

Q. Where was that at?

A. I was detained at Youth Center One Correctional Facility on a 60-day E study.

Q. Okay. Now what if anything happened to you that day?

A. Early in the morning I was awakened to take to Court for I didn't know at the time. I asked why I was going and they said Court matters.

So when I got to the Court building at around six o'clock in the morning --

Q. Let me stop you right there. Do you know approximately what time you got up?

A. Four o'clock.

Q. Do you know approximately what time you got to Court?

A. About six o'clock in the morning.

Q. Now had you not had to come up to the Courthouse that day, what time would you have gotten up?

A. Round 8:30.

Q. And what would you have done the rest of the day?

A. Go to my programs as in schooling and go to see my C and P officer as -- to see if I am going to be recommended the Youth Act or recommended for probation.

Q. So the fact that you had to come to Court you were not able to do all the things you would have normally done that day, is that correct?

A. Yes.

Q. Now you got to Court approximately six o'clock?

A. Yes.

Q. And then what happened?

THE COURT: I assume six o'clock a.m. in the morning?

THE WITNESS: Yes. I got there six o'clock a.m. and so I stayed in the bullpen until about 9:45, 10 o'clock and that was rather late because everybody else leaves out about nine o'clock.

So I am waiting. So the Marshalls call my name and so I responded as I am here. So he called me up, he asked me to show him my arm band or if I had an ID card.

I showed him my ID card so he verified it, he seen it was me. I went around to the Marshall's desk and it was two police waiting there. So I asked them what was this pertaining about and they said "don't worry, you will find out when you get there."

So that was that. They signed the custody order and took me downstairs.

BY MR. CONTE:

Q. Did you see the custody order?

A. Yes, it's a little white block paper.

MR. CONTE: Court's indulgence.

(P A U S E)

MR. CONTE: May I have this marked?

(The document was marked as Defendant's Exhibit No. 2 for identification.)

BY MR. CONTE:

Q. Mr. Green, I show you what's marked as Defendant's Exhibit Number Two and ask you if you have ever seen that document before?

A. Yes.

Q. Could you tell that Court what that is?

A. A custody order from when one set of people take your custody from another set of people and he signed it.

I couldn't see the name that he signed because I was trying to look but I was behind him.

Q. Now after the officer signed the document, what happened?

A. They took me downstairs.

Q. Is that here in the Courthouse?

A. Yes, I went downstairs. As I was leaving to go somewhere, they put me in a paddy wagon. I waited in there about ten minutes and then we left. When we went out we made a left --

Q. Let me stop you there. Do you know where you

came out of?

A. The tunnel.

Q. All right.

A. On the end where 500 C Street office building is located.

Q. Okay. And go ahead, continue.

A. So when I came out, we made a left. Went up to the corner at the light and made another left and made a sharp left and went down because you can't see no more sunlight and you could tell you went underground. So I waited in there.

Q. Is that 300 Indiana Avenue?

A. Yes.

Q. All right.

A. So when I went down in the tunnel I waited in the back of the paddy wagon for about half an hour and they didn't take me in, I just sat in the back.

I heard them in the front of the wagon talking, but you can't hear what they are saying, you can just hear. So then we left and went back to the Court building.

Q. Is that without getting out of the paddy wagon?

A. Yes.

Q. All right.

A. So we got back to the Court building and we was under there. So I asked them when am I going to go where

I am going.

So they said don't worry, you are going to get there. So I waited another half an hour under there.

I went back up again, waited for a little while --

Q. Went back up where?

A. Back to 300 Indiana Avenue.

Q. All right.

A. I waited another half hour and then I finally went up. And then that's when I seen Detective Gossage.

Q. You know approximately what time that was?

A. That was approximately twelve o'clock.

Q. All right. And do you recall what kind of room you were in when you saw Detective Gossage?

A. It's an open space, it wasn't no room, just an open space. A unit with dividers everywhere when I first seen him. Then he took me into a room.

Q. What if anything did Detective Gossage say to you?

A. He just asked me how I was doing, I said fine. I asked him what I was here for. He said I am here for murder. I said where's my lawyer at? He should have known I was being brought up here if I went to Court. So he was not saying nothing.

He was trying to slide me a card saying "sign this, sign this!" So I was not signing, I was denying it.

So --

Q. Is that the PD47, the Rights Card?

A. Yes. So I was denying it. So we was just talking back and forth and he was trying to get me to sign it telling me about the case.

So I was pushing it away saying I don't want to sign it. So then he said "I am going to be frank with you. We got you for Jamaican Tony, we know you had something to do with Jamaican Tony."

He said "I know you didn't shoot him, but you had something to do with it." So I am just sitting there, I said I had nothing to do with it, I am denying all allegations. He said "we know your friend Timothy Williams did it.

So then we still talking and I still ain't signed the card yet. So he finally said "You can make this hard on yourself or make it easy. We got you for Kevin Henson too, you are a suspect in that case. If you don't tell us something about Jamaican Tony, you are going to get charged for both of these cases." So I got scared.

Q. And then what happened?

A. So he said -- he slid me the card. He said "you can make it easy for yourself, you can tell us something about this or you can tell us -- or get both of the charges."

So I didn't know what to tell him, I didn't know where to begin. So he told me that Tim did it, he knew Tim did it. So I am thinking if he knows Tim did it, why ain't you charge him without what I have to say.

So he said "yes, we know he got shot in the building" and whatever. So when he was saying that I wasn't getting charged for Henson's case, I was thinking that's one less off my hands and so that's when I signed the card.

Q. Now when you signed the card had you -- had Detective Gossage or Detective Eisenhower or any police officer ever said that you were under arrest?

A. No, he just led me the card and wanted me to sign it.

Q. Did he read the front of that card to you?

A. No, he sat on one end of the desk and I sat on the other. He was looking impatiently for me to sign the card.

Q. Did he show you an arrest warrant?

A. No.

Q. All right. What happened next?

A. I signed the card. So he said "tell me a little bit about what happened." So after he told me that Tim did it, I just said Tim did it.

He said "so why you going to say Tim did it"

(3)

No. 91-1521

In the Supreme Court of the United States

OCTOBER TERM, 1991

UNITED STATES OF AMERICA, PETITIONER

v.

LOWELL GREEN

ON PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

REPLY BRIEF FOR THE UNITED STATES

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REPLY BRIEF FOR THE UNITED STATES

This case involves the application of the multiple layers of prophylaxis established by *Miranda* v. *Arizona*, 384 U.S. 436 (1966), *Edwards* v. *Arizona*, 451 U.S. 477 (1981), *Arizona* v. *Roberson*, 486 U.S. 675 (1988), and *Minnick* v. *Mississippi*, 111 S. Ct. 486 (1990), in a setting that tests the limits of those rules. The court of appeals believed that it was constrained by this Court's decisions to suppress respondent's confession. But the court noted (Pet. App. 14a-15a) that "it is not unfair to question the logic of a presumption that renders invalid an otherwise knowing, intelligent and voluntary waiver of *Miranda's* auxiliary protections—and so demands exclusion of a

murder confession voluntary in fact—because over five months earlier, in connection with an unrelated crime, the defendant asked for (and was afforded) the assistance of counsel." Review by this court is warranted to make clear that *Edwards* and its progeny do not impose a perpetual ban on police-initiated interrogation of suspects who invoke their *Edwards* right to counsel while in custody.

1. Respondent contends (Br. in Opp. 9) that "the Government egregiously misguides this Court on * * * the voluntariness of [respondent's] confession." In particular, respondent asserts (*id.* at 6) that he asked for a lawyer during the interrogation concerning the murder and that a police detective "directed" him to sign a waiver of rights card.

Respondents' factual assertions are based on his own testimony at the suppression hearing. As respondent concedes (Br. in Opp. 6-7), however, the trial court did not credit his testimony. Instead, the court found that, "as between those two accounts, that is the account given by [respondent] and Detective Gossage, the Court credits Detective Gossage's account." Pet. App. 20a. The trial court said:

> Having made this credibility finding which leads the Court to conclude that [respondent] was brought to the Homicide Office of the police department, was given his Miranda Rights in the way in which Detective Gossage testified they were given on the stand, that [respondent] understood his rights and that he appreciated them and thereafter waived them, the Court finds no basis to suppress any of these statements on the ground that they were given in violation of Miranda or were involuntarily made.

Id. at 21a-22a. Similarly, the court of appeals found (*id.* at 3a) that respondent was advised of his *Miranda* rights and chose to waive them. In short, both courts below found that respondent had made a "knowing, intelligent, and voluntary waiver of *Miranda*'s auxiliary protections." *Id.* at 14a.

Moreover, as respondent concedes (Br. in Opp. 7 n.1), he did not pursue the argument that his confession was involuntary before the court of appeals. Indeed, that court expressly stated (Pet. App. 5a n.2) that "[respondent] does not argue the constitutional involuntariness of the confession as an alternative ground supporting the suppression ruling." Thus, the court of appeals decided this case on the basis of undisputed findings that respondent's confession was knowing, intelligent, and voluntary. The court of appeals nevertheless believed that it was constrained by the prophylactic rules of *Edwards* v. *Arizona*, *supra*, *Arizona* v. *Roberson*, *supra*, and *Minnick* v. *Mississippi*, *supra*, to exclude respondent's voluntary confession. The government seeks review of that legal ruling.

2. Respondent asserts (Br. in Opp. 9-10) that the *Edwards* rule reflects this Court's recognition that police interrogation is "inherently coercive" and bars the admission of "coerced and unreliable confessions." But this Court has never held that police interrogation is "inherently coercive" in the sense that any confession obtained during police interrogation is ipso facto involuntary. On the contrary, the Court has recognized that "the ready ability to obtain uncoerced confessions is not an evil but an unmitigated good." *McNeil* v. *Wisconsin*, 111 S. Ct. 2204, 2210 (1991).[1]

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[1] Respondent contends (Br. in Opp. 9) that "[t]he Government inaccurately asserts that the [*Edwards*] rule protects the

Respondent asserts (Br. in Opp. 12) that "[i]t is difficult to imagine a situation where the police do not improperly influence an accused's decision when, knowing that the accused has asked for the assistance of counsel, the police reinitiate interrogation." The facts of this case, however, present such a situation. Respondent voluntarily confessed to his involvement in a murder more than five months after he invoked his right to counsel in connection with an unrelated offense, and after he had consulted repeatedly with counsel and entered a guilty plea to that offense.

3. a. Respondent contends (Br. in Opp. 13-16) that his decision to plead guilty to the drug offense was not sufficient to overcome the *Edwards* presumption. That is so, he contends (*id.* at 15-16) because his decision to plead guilty to the drug charge was not necessarily inconsistent with a continuing desire to deal with the police only through counsel on the unrelated murder charge. This argument, however, rests on the false premise that the *Edwards* presumption can be ended only by an event that conclusively establishes that a defendant now wishes to speak with the police. That this premise is false is demonstrated by the generally accepted principle that the *Edwards* presumption does not survive a break in custody. See *McNeil*, 111 S. Ct. at 2208. A defendant who has been released from custody after invoking

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accused only from police badgering." Contrary to respondent's contention, this Court repeatedly has recognized that the *Edwards* rule is "designed to prevent police from badgering a defendant into waiving his previously asserted *Miranda* rights." *McNeil* v. *Wisconsin*, 111 S. Ct. at 2208; *Minnick* v. *Mississippi*, 111 S. Ct. at 489; *Michigan* v. *Harvey*, 494 U.S. 344, 350 (1990); *Smith* v. *Illinois*, 469 U.S. 91, 98 (1984). Where there is no danger of police badgering, an absolute prohibition on police-initiated interrogation is unwarranted.

the right to counsel may or may not wish to speak to the police about a different charge thereafter; the same is true of a defendant who has entered a plea of guilty after invoking the right to counsel. Such intervening circumstances end the *Edwards* presumption not because they conclusively establish that the defendant does wish to speak to the police, but rather because they make it no longer reasonable irrebuttably to presume the contrary.

When a defendant has been released from custody or when, as in this case, a defendant's request for counsel has been honored, and he has entered a plea of guilty to the charges that prompted him to invoke the right to counsel, it is unlikely that he will feel badgered if the police subsequently approach him, repeat the *Miranda* warnings, and seek to question him concerning an unrelated offense. Rather, such a defendant will understand that he is simply being asked, in the context of an unrelated offense, to make "an *initial* election as to whether he will face the State's officers during questioning with the aid of counsel, or go it alone." *Patterson* v. *Illinois*, 487 U.S. 285, 291 (1988). In such circumstances, the prophylactic rule of *Miranda* suffices to ensure that defendants do not give statements to the police unless they freely choose to do so.

b. Respondent contends (Br. in Opp. 16-18) that the five-month interval between his invocation of the *Edwards* right and the initiation of interrogation is legally irrelevant, because the passage of time does not diminish the risk that questioning by the police will be perceived as badgering. That is not so. "[T]he coercion inherent in custodial interrogation derives in large measure from an interrogator's insinuations that the interrogation will continue until a confession is obtained." *Minnesota* v. *Murphy*, 465 U.S. 420, 433

(1984). In *Edwards*, moreover, only one day elapsed between the suspect's request for counsel and the reinitiation of interrogation. 451 U.S. at 478-479. The danger of badgering is greatly reduced when the police have honored the suspect's request for counsel and have made no effort to interrogate the defendant for more than five months after the assertion of his right.[2]

c. Respondent contends (Br. in Opp. 18-20) that the government is attempting to "muddy the specificity of the *Miranda-Edwards* rule" by arguing that it should not apply if the suspect's request for a lawyer has been honored *and* the questioning concerns an offense that is unrelated to the offense that prompted the suspect's invocation of the *Edwards* right. Even if this Court were to adopt the "bright-line" rule that the *Edwards* presumption lasts as long as the suspect remains in custody, the police would still be required to answer a number of difficult questions, such as whether a particular suspect is "in custody," whether the suspect has invoked the *Edwards* right to counsel at some point, whether there has been a break in custody since the invocation, and whether the suspect has waived the *Edwards* right. Moreover, this Court has recognized that prophylactic rules should be "'clear and unequivocal' * * * only when they guide sensibly." *McNeil*, 111 S. Ct. at 2211. Applying the *Edwards* presumption in the circumstances of this

[2] In the alternative, respondent argues (Br. in Opp. 17) that if the risk of badgering was attenuated by the passage of time, that risk was reintroduced in his case when he was awakened at 4 a.m. and taken to the police station. The time at which respondent was awakened had some relevance to the question whether his confession was voluntary; it has no relevance, however, to the general question whether the prophylactic rule of *Edwards* should last indefinitely.

case would not afford any significant protection to the suspect's constitutional rights, and would substantially hinder police investigation of the many persons who are investigated for multiple crimes and who at some point invoke the right to counsel in connection with a previous offense.

Finally, respondent contends (Br. in Opp. 19-20) that the confusion in the lower courts over whether *Edwards* creates a perpetual irrebuttable presumption was resolved by this Court's decision in *Minnick*. But *Minnick* did not address the question whether the *Edwards* presumption is perpetual; instead, it held that the presumption is not automatically dissolved when the police honor the suspect's request to consult with counsel. Consequently, *Minnick* has not resolved the question presented in this case.

For the foregoing reasons, and those set forth in the petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

KENNETH W. STARR
Solicitor General

MAY 1992

No. 91-1521

In the Supreme Court of the United States

OCTOBER TERM, 1992

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v.

LOWELL GREEN

ON WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether *Edwards* v. *Arizona*, 451 U.S. 477 (1981), requires the suppression of a voluntary confession because law enforcement officers initiated interrogation of the suspect five months after he invoked his right to counsel in connection with an unrelated offense, where the suspect consulted with counsel and pleaded guilty to the unrelated offense prior to the interrogation.

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OPINION BELOW

The opinion of the District of Columbia Court of Appeals (Pet. App. 1a-18a) is reported at 592 A.2d 985.

JURISDICTION

The judgment of the court of appeals was entered on May 31, 1991. A petition for rehearing was denied on November 25, 1991. Pet. App. 34a-35a. On February 11, 1992, the Chief Justice extended the time for filing a petition for a writ of certiorari to and including March 24, 1992. The petition was filed on March 20, 1992, and was granted on May 18, 1992. The jurisdiction of this Court rests on 28 U.S.C. 1257.

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the Constitution provides, in part: "No person * * * shall be compelled in any criminal case to be a witness against himself."

STATEMENT

1. On July 18, 1989, officers of the District of Columbia Metropolitan Police Department arrested respondent Lowell Green on drug charges. The officers gave respondent a printed advice-of-rights form known as a "PD 47." In response to the printed question whether he was willing to talk to the police without having an attorney present, respondent wrote "No." The officers did not attempt to question him. Pet. App. 2a.

Respondent appeared in court the following day, and an attorney was appointed to represent him. On July 28, 1989, the drug charges were dismissed at the preliminary hearing. Respondent remained in custody because of an unrelated juvenile matter. Pet. App. 2a.

In August 1989, respondent was indicted on charges of possessing a controlled substance with intent to distribute it arising out of respondent's July 18, 1989, arrest. On September 27, 1989, he entered a plea of guilty to the lesser included offense of attempted possession of a controlled substance with intent to distribute it. Pet. App. 2a.

Respondent remained in custody awaiting sentencing on the drug charge.[1] On January 4, 1990, a

[1] Respondent was held in the Youth Center at Lorton Reformatory while a study was performed to determine his suitability for treatment under the District of Columbia Youth Rehabilitation Amendment Act of 1985. Pet. App. 2a; see D.C. Code Ann. § 24-803(e) (1989). On February 26, 1990, respondent was sentenced to 15 months' incarceration under the Youth Rehabilitation Act. Pet. App. 2a.

Metropolitan Police Department detective obtained an arrest warrant charging respondent with the unrelated 1988 murder of Cheaver Herriott. The next day, officers brought respondent to the Police Department's Homicide Office for booking. The officers advised respondent of his *Miranda* rights, and he agreed to waive those rights. Respondent discussed his involvement in the murder of Herriott with the officers, and they again advised him of his rights. Respondent then made a videotaped statement in which he confessed to his involvement in the robbery and murder. Pet. App. 3a.

2. Respondent was indicted for murder. He moved to suppress his confession, claiming that it was involuntary and that it had been obtained in violation of *Edwards* v. *Arizona*, 451 U.S. 477 (1981).

The trial court initially denied respondent's motion. Pet. App. 19a-30a. The court first rejected respondent's contention that his confession was involuntary. After hearing testimony from Detective Donald Gossage of the Metropolitan Police Department and from respondent concerning the circumstances surrounding respondent's waiver of his *Miranda* rights, the trial court found that "as between those two accounts, that is the account given by [respondent] and Detective Gossage, the Court credits Detective Gossage's account." Pet. App. 20a. The trial court stated:

> Having made this credibility finding which leads the Court to conclude that [respondent] was brought to the Homicide Office of the police department, was given his Miranda Rights in the way in which Detective Gossage testified they were given on the stand, that [respondent] un-

> derstood his rights and that he appreciated them and thereafter waived them, the Court finds no basis to suppress any of these statements on the ground that they were given in violation of Miranda or were involuntarily made.

Id. at 21a-22a.

With respect to respondent's *Edwards* claim, the court noted that an "extraordinary amount of time" had elapsed between respondent's invocation of his right to counsel and his confession, and that respondent had had an opportunity to consult with counsel during that time. Pet. App. 25a. Under those circumstances, the court concluded that "none of the reasons which underlie the [Supreme] Court's decision[s] which have addressed a criminal defendant's right to [counsel] under the [Sixth] Amendment and his right not to incriminate himself under the [Fifth] Amendment, would be served by suppression of these statements." *Id.* at 26a.

Five days after the trial court's ruling, this Court decided *Minnick* v. *Mississippi*, 111 S. Ct. 486 (1990). In light of that decision, the trial court reconsidered its ruling on respondent's *Edwards* claim and ordered that respondent's confession be suppressed. Pet. App. 31a-33a.

3. The District of Columbia Court of Appeals affirmed. Pet. App. 1a-18a. The court acknowledged that this case differs from *Edwards* and other cases decided by this Court in several ways.

First, the interrogation concerned an unrelated crime and took place after respondent had consulted with a lawyer. Pet. App. 6a-8a. The court noted, however, that the second factor was present in *Minnick*, and the first factor was present in *Arizona* v. *Roberson*, 486 U.S. 675 (1988). The court therefore

concluded that *Minnick* and *Roberson* required the court to reject the government's reliance on those factors. In the court's view, to admit the challenged evidence in this case would require that *Minnick* and *Roberson* be "narrow[ed] * * * to their individual settings." Pet. App. 7a.

Second, the court recognized that this case differs from the *Edwards* line of cases because there was a five-month interval between respondent's invocation of the *Edwards* right to counsel and the subsequent interrogation. Pet. App. 8a-12a. The court stated that "[t]here is no question" that the danger of police badgering that the *Edwards* rule is designed to prevent "is reduced when the police have made no effort to interrogate the defendant for more than five months after his assertion of rights." *Id.* at 8a-9a. Although the court viewed as "substantial" the government's arguments against a "perpetual irrebuttable presumption," *Id.* at 9a, 11a (quoting *Minnick*, 111 S. Ct. at 496 (Scalia, J., dissenting)), it concluded that "only the Supreme Court can explain whether the *Edwards* rule is time-tethered." Pet. App. 11a.

Third, the court recognized that before the interrogation, respondent pleaded guilty to the offense with which he was charged when he invoked the *Edwards* right. Pet. App. 12a-14a. The court noted (*id.* at 12a) that this "might seem to be [the government's] most potent argument" for distinguishing *Edwards*, and that cutting off the irrebuttable presumption of *Edwards* when a defendant pleads guilty "promises adherence to the requirement of some form of bright-line rule." *Ibid.* The court nevertheless concluded that a plea of guilty "is consistent with [the defendant's] election to communicate with the police only through counsel," and that therefore the

continued application of the prophylactic rule of *Edwards* was necessary in the circumstances of this case. *Id.* at 14a.

The court observed that "it is not unfair to question the logic of a presumption that renders invalid an otherwise knowing, intelligent and voluntary waiver of *Miranda's* auxiliary protections—and so demands exclusion of a murder confession voluntary in fact—because over five months earlier, in connection with an unrelated crime, the defendant asked for (and was afforded) the assistance of counsel." Pet. App. 14a-15a. The court added that, if it had reached the wrong result, "then it is for the [Supreme] Court in this case or some future one to provide the *Leitfaden*—the red thread—through its decisions leading to the correct result." *Id.* at 15a.[2]

Judge Steadman dissented. Pet. App. 16a-18a. He reasoned that the irrebuttable presumption of *Edwards* should not continue to apply after a suspect waives his Fifth Amendment right against compulsory self-incrimination and pleads guilty to the offense that prompted the invocation of the *Edwards* right. He noted that a guilty plea represents "a sea change in th[e] circumstances which existed at the time the right to counsel was originally invoked."

[2] The court noted (Pet. App. 5a n.2) that "[o]n appeal [respondent] does not argue the constitutional involuntariness of the confession as an alternative ground supporting the suppression ruling." The court of appeals nevertheless stated (*id.* at 14a) that respondent made a "knowing, intelligent and voluntary waiver of *Miranda's* auxiliary protections." In addition, the court of appeals rejected respondent's contention that the government delayed unnecessarily in bringing him to court for arraignment on the murder charge. *Id.* at 4a-5a n.2. Finally, the court held (*id.* at 3a-4a n.1) that this case presents "no issue of violation of [respondent's] right to counsel under the Sixth Amendment."

Pet. App. 16a. Indeed, a guilty plea "entail[s] a knowing, voluntary, and intelligent waiver of the Fifth Amendment right against self-incrimination and its consequent concerns—the very right that *Edwards* seeks to protect." *Id.* at 18a.

The government's petition for rehearing en banc was denied by an equally divided vote. Pet. App. 34a-35a.

SUMMARY OF ARGUMENT

More than five months after respondent invoked his *Edwards* right to counsel—and after he consulted with counsel and pleaded guilty to the offense that prompted his invocation of the *Edwards* right—respondent confessed to his involvement in an unrelated murder. Both courts below concluded that respondent's confession was voluntary, knowing, and intelligent, and there is no indication that the confession was the product of any form of police misconduct. The court of appeals nevertheless believed that this Court's decisions in *Miranda* v. *Arizona*, *Edwards* v. *Arizona*, *Arizona* v. *Roberson*, and *Minnick* v. *Mississippi* required it to suppress respondent's confession.

Those decisions established a series of prophylactic rules designed to protect the Fifth Amendment privilege against compelled self-incrimination in the context of custodial interrogation. The Court has justified the creation of each of those rules on the ground that it protects the suspect against the inherently coercive pressures of interrogation in a police-dominated setting. The Court has emphasized that the scope of each of those prophylactic rules must be determined by reference to the purposes that justify the rule. In general, compliance with *Miranda* ensures that a suspect's decision to speak to the police is the product of a knowing, intelligent, and volun-

tary choice. The *Edwards* rule adds a second layer of prophylactic protection. It creates an irrebuttable presumption of coercion, but only in circumstances in which the risk of coercion is so great as to make such a presumption appropriate.

The Court has never held that the *Edwards* rule permanently bars a suspect who invokes the right to the presence of counsel during custodial interrogation from waiving that right at the request of the police. So sweeping an approach would expand the *Edwards* rule far beyond its prophylactic purposes. Rather, in each of the cases in which it has applied the *Edwards* rule, the Court has assured itself that the circumstances presented a very real risk of coercion. This case, however, differs from this Court's previous cases in several critical respects, which indicate that *Edwards*' irrebuttable presumption of coercion should have no application here.

First, respondent entered a plea of guilty to the charge that prompted his invocation of the *Edwards* right to counsel before the police initiated interrogation. A defendant's decision to plead guilty marks a break in the suspect's status as a pretrial arrestee. In addition, it represents a waiver of the defendant's Fifth Amendment privilege against compelled self-incrimination. A suspect who has waived his Fifth Amendment privilege and pleaded guilty is unlikely to feel badgered if the police subsequently approach him, repeat the *Miranda* warnings, and seek to question him about an unrelated offense. Just as a break in custody dissolves the *Edwards* presumption, a guilty plea so alters an arrestee's situation that courts should not continue to presume, irrebuttably, that the arrestee wishes to deal with the police only through counsel. In such circumstances, the prophylactic rules of *Miranda* suffice to ensure that suspects do

not give statements to police unless they freely choose to do so.

Second, more than five months elapsed between respondent's assertion of the *Edwards* right to counsel and the initiation of interrogation by the police. In *Edwards* itself, and in this Court's subsequent decisions applying *Edwards*, the police reinitiated interrogation within a short time after the suspect's request for counsel. Where months have passed without any effort by the police to question the suspect, however, there is no reason to presume that a suspect will feel badgered by a police inquiry into whether the suspect wishes to speak to them without counsel. A perpetual irrebuttable presumption that a suspect who has once invoked his *Edwards* right to counsel may never be approached by the police as long as he remains in custody would result in the suppression of entirely voluntary confessions without advancing the purposes underlying the *Edwards* rule.

Third, the police initiated the interrogation only after respondent had been provided with counsel and had consulted with his lawyer, and the questioning concerned a crime wholly unrelated to the offense that prompted respondent's invocation of the *Edwards* right. Thus, this case is unlike both *Arizona* v. *Roberson*, in which the police reinitiated interrogation without honoring the suspect's request for counsel, and *Minnick* v. *Mississippi*, in which the renewed interrogation concerned the same offense that prompted the suspect's invocation of the *Edwards* right. When a suspect's prior invocation of the right to counsel has been honored, *and* he is later approached by the police about a different offense, he will likely understand that he is not being badgered, but is simply being asked, in the context of the new offense, to make an initial election as to whether he

will discuss the new matter with the police alone, or only in the presence of counsel.

Because the prophylactic rules of *Miranda* and *Edwards* are not constitutionally required, the Court has carefully weighed the benefits of those rules against their costs in restricting police investigations and excluding voluntary confessions from evidence. The costs are clear. *Miranda* and *Edwards* result in the suppression of uncoerced confessions that, in many cases, may be essential to the successful prosecution of crime. The costs are magnified by the court of appeals' decision, which effectively imposes a perpetual ban on any police-initiated interrogation of a suspect in custody who has invoked his *Edwards* right to counsel. Because many offenders commit multiple crimes, such a rule would extend the exclusionary rule of *Edwards* in a way that would seriously impede effective law enforcement.

The countervailing benefits of such an extension of *Edwards* would be minimal. A person in respondent's position already has the protection of *Miranda* warnings. He is thus unlikely to feel badgered to speak with the police when they approach him long after his invocation of the *Edwards* right to counsel, seeking to question him about an unrelated crime. Any additional protection of the Fifth Amendment privilege that might result from applying the *Edwards* rule in that context is far outweighed by the high costs that such an application would impose on society.

ARGUMENT

THE *EWARDS* RULE SHOULD NOT APPLY TO AN INTERROGATION CONDUCTED FIVE MONTHS AFTER THE SUSPECT INVOKED THE RIGHT TO COUNSEL IN CONNECTION WITH AN UNRELATED OFFENSE, WHERE THE SUSPECT HAS CONSULTED WITH COUNSEL AND PLEADED GUILTY TO THAT OFFENSE PRIOR TO THE INTERROGATION

In *Miranda* v. *Arizona*, 384 U.S. 436 (1966), this Court concluded that custodial interrogation generates "pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely." *Id.* at 467. To counteract those pressures, the Court devised a set of prophylactic rules designed to protect the Fifth Amendment privilege in the context of custodial interrogation. The Court held that before conducting custodial interrogation, the police must advise a suspect of his right to remain silent, his right to consult with counsel and have counsel present during interrogation, and his right to have counsel appointed for him if he is indigent. In addition, the police must inform the suspect that if he waives those rights and makes a statement, anything he says may be used against him in court. 384 U.S. at 467-473. Those procedures are necessary, the Court concluded, to ensure that the coercive pressures of custodial interrogation do not lead a suspect to relinquish his privilege against compulsory self-incrimination "where he would not otherwise do so freely." *Id.* at 467.

Fifteen years later, in *Edwards* v. *Arizona*, 451 U.S. 477 (1981), the Court announced an additional prophylactic rule for cases in which the suspect invokes his right to have counsel present during cus-

todial interrogation. The Court held that following such a request, a suspect "is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police." *Id.* at 484-485.

In subsequent decisions, the Court has elaborated further upon the prophylactic rules established in *Miranda* and *Edwards*. In *Arizona* v. *Roberson*, 486 U.S. 675 (1988), the Court extended the principle of *Edwards* to interrogations conducted in the course of separate investigations, holding that a suspect's request for counsel bars subsequent police-initiated custodial interrogation "[w]hether [the] reinterrogation concerns the same or a different offense." *Id.* at 683-685, 687. And in *Minnick* v. *Mississippi*, 111 S. Ct. 486 (1990), the Court held that permitting a suspect who has requested counsel to consult with his lawyer before reinitiating custodial interrogation is not sufficient to satisfy the *Edwards* rule. Instead, the Court held that "when counsel is requested, interrogation must cease, and officials may not reinitiate interrogation without counsel present, whether or not the accused has consulted with his attorney." *Id.* at 491.

The court of appeals felt constrained by the prophylactic rules established in *Miranda*, *Edwards*, *Roberson*, and *Minnick* to suppress respondent's confession. The court did so even though the police questioned respondent about an offense unrelated to the one that prompted his invocation of the *Edwards* right to counsel: even though more than five months passed between his invocation of the *Edwards* right and his interrogation; and even though respondent had consulted with counsel and pleaded guilty to the initial

offense before the police approached him for questioning with respect to the second offense. Because applying the *Edwards* rule in the circumstances of this case would not advance the purpose underlying that rule, the courts below erred in suppressing respondent's confession.[2]

1. The *Edwards* rule, like other applications of *Miranda*, "is not itself required by the Fifth Amendment's prohibition on coerced confessions, but is instead justified only by reference to its prophylactic purpose." *Connecticut* v. *Barrett*, 479 U.S. 523, 528 (1987). The Court has repeatedly stated that the justification for the prophylactic rules established in *Edwards* and the cases following it is the need to "prevent police from badgering a defendant into waiving his previously asserted *Miranda* rights." *McNeil* v. *Wisconsin*, 111 S. Ct. 2204, 2208 (1991) (quoting *Michigan* v. *Harvey*, 494 U.S. 344, 350 (1990)); see *Minnick* v. *Mississippi*, 111 S. Ct. at 489; *Smith* v. *Illinois*, 469 U.S. 91, 98 (1984); *Oregon* v. *Bradshaw*,

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[2] The Sixth Amendment right to counsel is not at issue in this case. The Sixth Amendment right attaches only "at or after the initiation of adversary judicial criminal proceedings—whether by way of formal charge, preliminary hearing, indictment, information, or arraignment." *United States* v. *Gouveia*, 467 U.S. 180, 188 (1984) (quoting *Kirby* v. *Illinois*, 406 U.S. 682, 689 (1972) (plurality opinion)). At the time respondent invoked his right to counsel, adversary judicial criminal proceedings had not been initiated on the murder charge—or, for that matter, on the unrelated drug charges. Although respondent's Sixth Amendment right to counsel on the drug charges had attached at the time he waived his *Miranda* rights, the Sixth Amendment right did not extend to the unrelated murder charge at issue in this case. See *McNeil* v. *Wisconsin*, 111 S. Ct. 2204, 2207-2208 (1991) (Sixth Amendment right to counsel is "offense-specific").

462 U.S. 1039, 1044 (1983). The concern underlying the *Edwards* rule is that "[i]n the absence of such a bright-line prohibition, the authorities * * * might * * * wear down the accused and persuade him to incriminate himself notwithstanding his earlier request for counsel's assistance." *Smith* v. *Illinois*, 469 U.S. at 98. And because the *Edwards* rule establishes a second layer of prophylaxis on top of the protections provided by *Miranda*, the Court has applied *Edwards* only in circumstances where the Court has perceived a substantial risk of coercion.

The Court has never held that the *Edwards* rule permanently bars a suspect who invokes the right to the presence of counsel during custodial interrogation from waiving that right at the request of the police.[4] Such a permanent, irrebuttable presumption would sweep far more broadly than necessary to protect the Fifth Amendment privilege. Several factors distinguish this case from the Court's previous *Edwards* decisions. Taken singly or in conjunction, those factors indicate that it is highly unlikely that the reinitiation of police questioning wore down respond-

[4] It is true that there is language in this Court's previous decisions that, if interpreted without regard to the factual settings in which those cases arose, could be read to suggest that the *Edwards* presumption lasts in perpetuity, or at least for so long as the suspect remains in custody. See *Minnick*, 111 S. Ct. at 491; *Edwards*, 451 U.S. at 482. But "words of * * * opinions are to be read in the light of the facts of the case." *Armour & Co.* v. *Wantock*, 323 U.S. 126, 133 (1944). Moreover, the Court has emphasized that its prophylactic rules should not be read so broadly, but rather must be understood in light of the prophylactic purposes that justify them. See *Connecticut* v. *Barrett*, 479 U.S. at 528.

ent and induced him to confess. For that reason, there is no justification for applying the irrebuttable presumption of the *Edwards* rule.

a. First, this case differs from the Court's previous *Edwards* cases because a pivotal event intervened between respondent's invocation of his *Edwards* right and the police interrogation: prior to the interrogation about the murder, respondent entered a plea of guilty to the drug charge that had prompted his invocation of the *Edwards* right to counsel.

A guilty plea "represents a break in the chain of events which has preceded it in the criminal process," *Tollett* v. *Henderson*, 411 U.S. 258, 267 (1973), and constitutes a waiver of the Fifth Amendment right not to be compelled to incriminate oneself. *Boykin* v. *Alabama*, 395 U.S. 238, 243 (1969); *McCarthy* v. *United States*, 394 U.S. 459, 466 (1969).

> Central to the [guilty] plea and the foundation for entering judgment against the defendant is the defendant's admission in open court that he committed the acts charged in the indictment. He thus stands as a witness against himself [even though] he is shielded by the Fifth Amendment from being compelled to do so.

Brady v. *United States*, 397 U.S. 742, 748 (1970).

Because a guilty plea marks a sharp break in the proceedings, and because a guilty plea constitutes a waiver of the same Fifth Amendment right that is protected by the *Miranda* and *Edwards* rules, it does not make sense automatically to treat a defendant who has pleaded guilty as if he were still a pretrial arrestee. To the contrary, the entry of a guilty plea to the charge as to which the defendant invoked his *Edwards* right should be sufficient to lift the irre-

buttable presumption that any subsequent waiver of that right is the product of police coercion.

In this case, the court of appeals applied the *Edwards* presumption despite respondent's guilty plea, because it concluded that respondent's decision to plead guilty to the drug charge was not necessarily inconsistent with a continuing desire to "deal with government officials only through an attorney." Pet. App. 14a. We agree with the court of appeals that a guilty plea is not necessarily inconsistent with a continuing desire to deal with the government only through counsel. But we disagree with the court's implicit conclusion that the *Edwards* presumption can be rebutted only by an event that conclusively establishes that a suspect has decided to speak with the police in counsel's absence.

The fallacy of that position is demonstrated by the generally accepted principle that the *Edwards* presumption does not survive a break in custody. See *McNeil* v. *Wisconsin*, 111 S. Ct. at 2208 (*Edwards* rule applies "assuming there has been no break in custody"); *Dunkins* v. *Thigpen*, 854 F.2d 394, 397 (11th Cir. 1988), cert. denied, 489 U.S. 1059 (1989); *McFadden* v. *Garraghty*, 820 F.2d 654, 661 (4th Cir. 1987); *United States* v. *Skinner*, 667 F.2d 1306, 1309 (9th Cir. 1982), cert. denied, 463 U.S. 1229 (1983). A break in custody, like a guilty plea, does not conclusively establish that the suspect now wishes to speak to the police directly. Indeed, a suspect who has invoked the *Edwards* right to counsel and subsequently been released from custody may well be inclined to adopt the same course if he is subsequently taken into custody and questioned. The courts nevertheless have concluded that the Fifth Amendment privilege does not require the auxiliary protection of the *Edwards* rule following a break in custody. The reason a break in custody ends the *Edwards* presumption thus is not because it conclusively establishes that a suspect will thereafter wish to speak to the police, but rather because it is so dramatic a change in circumstances that it is no longer reasonable irrebuttably to presume the contrary.

The "break in custody" cases are merely specific examples of a broader point: the irrebuttable presumption from *Edwards* should not apply when there is a significant change in the accused's status prior to the interrogation. In each of the cases in which this Court has applied *Edwards* to require suppression of a confession, the accused was a pretrial arrestee both when he invoked his *Edwards* right to counsel and when the police reapproached him. In that setting, the Court concluded that there was no objective reason to believe that the accused would take a different view of whether he should speak with the police outside the presence of counsel. Where the status of the accused has changed dramatically, as it does once he is released from custody or after an adjudication of guilt (whether after a guilty plea or after trial), the assumption that he wishes to have the assistance of counsel in all of his dealings with the police is much less compelling. In a case such as this one, the relevant question is therefore not whether an intervening plea of guilty conclusively establishes that a suspect wishes to speak to the police directly, but whether such a plea renders unreasonable the continued application of *Edwards*' irrebutable presumption that a subsequent decision to speak with the police on their request is the product of coercion, rather than a knowing, intelligent, and voluntary decision by the suspect.

In sum, there is no justification for continuing to apply the *Edwards* presumption once a suspect's request for counsel has been honored and he has entered a guilty plea to the charges that prompted him to invoke the right to counsel. Because a guilty plea marks the end of the investigative process that led to the suspect's invocation of his *Edwards* right, and because the plea reflects the defendant's willingness to waive his Fifth Amendment right with regard to the charged offense, the police should be permitted to approach the subject, repeat the *Miranda* warnings, and seek to determine if he would now like to speak with them about an unrelated offense. If the suspect is still unwilling "to communicate with the police except through an attorney, he can simply tell them that when they give him the *Miranda* warnings." *McNeil* v. *Wisconsin*, 111 S. Ct. at 2210. In those circumstances, the prophylactic rule of *Miranda* suffices to ensure that suspects do not give statements to the police unless they freely choose to do so.

b. A second, and related, factor distinguishing this case from previous *Edwards* decisions is the "extraordinary amount of time" that elapsed between respondent's invocation of his right to counsel and his confession. Pet. App. 25a. The Court's previous decisions applying the *Edwards* rule have involved repeated police-initiated questioning within a short time after a suspect's arrest. In *Edwards* itself, the police officers reinitiated interrogation only one day after the suspect invoked his right to counsel. See 451 U.S. at 478-479. In both *Minnick* and *Roberson*, only three days elapsed between the suspect's invocation of the right to counsel and the reinitiation of

interrogation. See 111 S. Ct. at 488-489; 486 U.S. at 678.[5]

Unlike the suspects in this Court's previous *Edwards* cases, respondent was not subjected to repeated police-initiated interrogation within a period of a few days. To the contrary, the police made no effort to question respondent for more than five months after his assertion of the *Edwards* right. The initiation of interrogation five months after a suspect invokes his right to counsel in no way resembles the "persistent attempts by officials to persuade [a suspect] to waive his rights" that the *Edwards* rule is designed to prevent. See *Minnick* v. *Mississippi*, 111 S. Ct. at 491. Consequently, it does not make sense to treat a suspect who has been in custody for months the same as a pretrial arrestee who recently was subject to police interrogation and asserted the *Edwards* right.

A suspect approached for questioning only twice in five months is unlikely to feel "badgered" by the police. Similarly, the suspect is unlikely to conclude from the second approach that the police were not serious about the suspect's right to request that counsel be present during questioning and that they intend to proceed with questioning without regard to the suspect's desire for counsel. Cf. *Minnesota* v. *Murphy*, 465 U.S. 420, 433 (1984) ("[T]he coercion inherent in custodial interrogation derives in large measure from an interrogator's insinuations that the interrogation will continue until a confession is ob-

[5] See also *Smith* v. *Illinois*, 469 U.S. at 98-99 (*Edwards* rule was violated where, after suspect requested counsel during administration of *Miranda* warnings, police officer immediately proceeded to finish advising suspect of his *Miranda* rights and then pressured suspect to answer questions without an attorney); *Solem* v. *Stumes*, 465 U.S. 638,

tained."). Because application of the *Edwards* rule in this context would not promote the rule's anti-badgering purpose, there is no justification for indulging the irrebuttable presumption that the officers' inquiry into whether the suspect wishes to speak to them without counsel will overbear the will of the suspect and compel him to speak when he would otherwise remain silent.

Citing this Court's "emphasis on the need for a bright-line rule in this area," Pet. App. 11a, the court of appeals felt constrained to hold that the prophylactic rules established in *Edwards*, *Roberson*, and *Minnick* barred the police from reinitiating interrogation of respondent on any subject for as long as he remained in custody, despite the intervening circumstances of his consultation with counsel and entry of a guilty plea. To be sure, a rule that the *Edwards* presumption lasts forever, or at least as long as the suspect remains in custody, has at least the appearance of clarity.[6] This Court has recog-

612 (1984) (assuming, for purposes of deciding whether *Edwards* would be applied retroactively, that police violated *Edwards* rule when they twice reinitiated custodial interrogation within one day after suspect invoked right to counsel).

[6] Although such a rule can be clearly stated, it has other features that make it ill-suited to serve as a bright-line guide to police as they perform their investigative functions. Many suspects commit multiple crimes, and persons in long-term custody often become suspects in other offenses. Moreover, suspects or prisoners are often transferred from one jail or prison to another, and may at different times be questioned by officers from various local, state, or federal law enforcement agencies. It is one thing to require the police to determine whether a suspect has recently invoked the right to counsel under *Miranda*. See *Roberson*, 486 U.S. at 687-688. It is quite another to require the police to determine whether a suspect in long-term custody has ever invoked the *Edwards* right at any time, in any place,

nized, however, that prophylactic rules should be " 'clear and unequivocal' * * * only when they guide sensibly." *McNeil* v. *Wisconsin*, 111 S. Ct. at 2211. See also *New York* v. *Quarles*, 467 U.S. 649, 658 (1984) (adopting exigent circumstances exception to *Miranda* even though the exception "to some degree * * * lessen[s] the desirable clarity of that rule"). In *Michigan* v. *Mosley*, 423 U.S. 96, 104, 107 (1975), the Court concluded that police officers "scrupulously honored" the suspect's assertion of the right to silence when they "suspended questioning entirely for a significant period before beginning the interrogation that led to [the suspect's] incriminating statement." Although the Court's approach in *Mosley* blurred the bright-line quality of the *Miranda* rules to some extent, the Court made clear that *Mosley* rests on the same concern that underlies *Edwards*' rule prohibiting the reinitiation of interrogation following a suspect's invocation of the right to counsel—the danger that the police will "persist[] in repeated efforts to wear down [the suspect's] resistance and make him change his mind." 423 U.S. at 105-106. Consequently, ly, in the *Edwards* context, as well as the context of a suspect who asserts the right to remain silent, imposing "a blanket prohibition against the taking of voluntary statements or a permanent immunity from further interrogation, regardless of the circumstances, would transform the *Miranda* safeguards into wholly irrational obstacles to legitimate police investigative activity." *Mosley*, 423 U.S. at 102. Thus, at least when more than a few days have passed since the suspect's invocation of his *Edwards*

during any interrogation by any police officer. Consequently, whatever the facial clarity of a perpetual *Edwards* rule, it would be extraordinarily difficult to apply as a guide to police conduct.

right, and when the suspect is not simply continuing to be held on the strength of his initial arrest, the irrebuttable presumption of *Edwards* should give way.[7]

c. Finally, this case differs from the Court's earlier *Edwards* rulings because respondent was approached by the police concerning the murder only after his previous request for counsel in connection with the drug offense had been honored. Respondent was provided with counsel and had consulted with his lawyer months before the police sought to question him about the murder, which was wholly unrelated to the drug charge that had prompted his invocation of the *Edwards* right. Thus, this case is unlike either *Arizona* v. *Roberson*, in which the police reinitiated interrogation without honoring the suspect's request for counsel, or *Minnick* v. *Mississippi*, in which the renewed interrogation concerned the same offense

[7] See *United States* v. *Hall*, 905 F.2d 959, 963 (6th Cir. 1990) ("neither *Edwards* nor *Roberson* can be interpreted * * * to grant * * * a blanket protection continuing *ad infinitum*"), cert. denied, 111 S. Ct. 2858 (1991); 905 F.2d at 965 (Ryan, J., concurring) (presumption that waiver of *Miranda* rights was the product of inherently compelling pressures of custodial interrogation rebutted when three months elapsed between assertion of *Edwards* right to counsel and reinitiation of interrogation); *State* v. *Newton*, 682 P.2d 295, 298 (Utah 1984) (*Edwards* presumption rebutted where three months elapsed between first and second interrogation, counsel was made available to the defendant in the interim, and renewed questioning concerned an unrelated offense). But see *Kochutin* v. *State*, 813 P.2d 298, 304 (Alaska Ct. App. 1991) (applying *Edwards* rule despite one-year interval between invocation of right to counsel and police-initiated interrogation); *Walker* v. *State*, 573 So. 2d 415, 416 (Fla. Dist. Ct. App. 1991) (suggesting that *Edwards* rule could remain in effect "for the rest of the [suspect's] life"), vacated and remanded, 112 S. Ct. 1927 (1992).

that had prompted the suspect's invocation of the right to counsel. The fact that counsel had been made available to respondent eliminated the coercive pressures that arise when police reinitiate custodial interrogation of a "suspect who has been denied the counsel he has clearly requested." See *Roberson*, 486 U.S. at 686 & n.6. And the fact that the questioning concerned an unrelated offense greatly reduced the possibility that respondent would be badgered into making a statement by repeated police-initiated questioning. See *Minnick*, 111 S. Ct. at 491 (discussing "persistent attempts by officials to persuade [suspects] to waive [their] rights").

When a suspect's request for counsel has been honored *and* the renewed questioning concerns an offense that is unrelated to the one that prompted the request, the suspect is much less likely to perceive the reinitiation of interrogation as badgering by the police. Instead, the suspect will likely understand that he is simply being asked, in the context of the new offense, to make "an *initial* election as to whether he will face the State's officers during questioning with the aid of counsel, or go it alone." *Patterson* v. *Illinois*, 487 U.S. 285, 291 (1988). If the suspect "'knowingly and intelligently' pursues the latter course," there is "no reason why the uncounseled statements he then makes must be excluded at his trial." *Ibid.*

2. Because the prophylactic rules of *Miranda* and *Edwards* "sweep[] more broadly than the Fifth Amendment itself," *Oregon* v. *Elstad*, 470 U.S. 298, 306-307 (1985), and thus inevitably result in the suppression of some voluntary confessions, this Court has carefully weighed the benefits of expanding such rules against the costs of restricting police investigations and excluding voluntary confessions from

evidence. See, *e.g.*, *New York* v. *Quarles*, 467 U.S. 649, 657 (1984); *Michigan* v. *Tucker*, 417 U.S. 433, 450-451 (1974). The Court has recognized that " 'the need for police questioning as a tool for effective enforcement of criminal laws' cannot be doubted. * * * Admissions of guilt are more than merely 'desirable' * * *; they are essential to society's compelling interest in finding, convicting, and punishing those who violate the law." *Moran* v. *Burbine*, 475 U.S. 412, 426 (1986); see also *McNeil* v. *Wisconsin*, 111 S. Ct. at 2210 ("the ready ability to obtain uncoerced confessions is not an evil but an unmitigated good"); *Oregon* v. *Elstad*, 470 U.S. at 305; *United States* v. *Washington*, 431 U.S. 181, 186-187 (1977); *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 225 (1973). Confessions, if obtained by fair methods that guarantee their reliability, result in the resolution of many cases that could not otherwise be solved, ensure confidence in the accuracy of criminal judgments, reduce the risk of prosecuting or convicting innocent persons, and alleviate burdens on all segments of the criminal justice system. Any rule that excludes voluntary, reliable confessions from evidence therefore imposes substantial costs and carries a heavy burden of justification.

The rule adopted by the court of appeals imposes a perpetual ban on police-initiated custodial interrogation after a suspect's invocation of the *Edwards* right to counsel. That rule would seriously impede effective law enforcement by requiring exclusion of voluntary, reliable confessions made after otherwise valid waivers of *Miranda* rights. Moreover, because many offenders commit multiple crimes, and it is common for a person under suspicion in connection with one offense to have invoked the right to counsel at some previous point in a separate case, a rule that

permanently forecloses all police-initiated interrogation of such persons while they remain in custody would impose a particularly high cost in restricting law enforcement efforts.

Any benefit that might be obtained by applying the prophylactic rule of *Edwards* in this context does not outweigh the costs associated with the restriction of police investigations and the suppression of probative, voluntary confessions. A request by the police to interrogate a suspect on a new subject more than five months after the suspect's invocation of his right to counsel, and after the suspect has entered a guilty plea on the charges that prompted the request for counsel, poses very little danger that the suspect will be badgered into making a statement when he would otherwise remain silent. Moreover, the police are in any event required to provide suspects with *Miranda* warnings prior to any interrogation, and compliance with that requirement will ensure that suspects do not give statements to the police unless they freely choose to do so. In these circumstances, applying the *Edwards* rule would not afford any significant protection to the suspect's constitutional rights. In light of the high cost of restricting police investigations and excluding voluntary confessions, the prophylactic rule of *Edwards* should not be extended to cases like this one, in which the concerns underlying that rule are not implicated. Cf. *Berkemer* v. *McCarty*, 468 U.S. 420, 437 (1984) ("Fidelity to the doctrine announced in *Miranda* requires that it be enforced strictly, but only in those types of situations in which the concerns that powered the decision are implicated.").

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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No. 91-1521

In The

Supreme Court of the United States

October Term, 1992

UNITED STATES,

PETITIONER,

v.

LOWELL GREEN,

RESPONDENT.

On Writ Of Certiorari To The District Of Columbia Court Of Appeals

BRIEF FOR THE RESPONDENT

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QUESTION PRESENTED

Whether the "bright-line" rule established by *Edwards v. Arizona*, 451 U.S. 477 (1981), *Arizona v. Roberson*, 486 U.S. 675 (1988) and *Minnick v. Mississippi*, 111 S.Ct 586 (1990) should be changed to permit law enforcement officers to initiate interrogation of a suspect who has invoked his right to counsel five months previously in connection with an unrelated offense, where the suspect consulted with counsel and pleaded guilty to the unrelated offense prior to the interrogation.

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The "bright-line" rule established by *Edwards v. Arizona*, should not be changed to permit law enforcement officers to initiate interrogation of a suspect who has invoked his right to counsel five months previously in connection with an unrelated offense, where the suspect consulted with counsel and pleaded guilty to the unrelated offense prior to the interrogation 12

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OPINION BELOW

The opinion of the District of Columbia Court of Appeals (Res. App. A, 1a-18a) is reported at 592 A. 2d 985.

JURISDICTION

The judgment to the court of appeals was entered on May 31, 1991. A petition for rehearing was denied on November 25, 1991. Pet. App. 34a-35a. On February 11, 1992, the Chief Justice extended the time for filing a petition for a writ of certiorari to and including March 24, 1992. The petition was filed on March 20, 1992, and was granted on May 18, 1992. The jurisdiction of this Court rests on 28 U.S.C. 1257.

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the Constitution provides, in part: "No person • • • shall be compelled in any criminal case to be a witness against himself."

STATEMENT OF CASE

On July 18, 1989, officers of the District of Columbia Metropolitan Police Department arrested respondent Lowell Green on drug charges. The officers gave respondent a printed advice-of-rights form known as a "PD 47." In response to the printed question whether he was willing to talk to the police without having an attorney

present, respondent wrote "no." The officers did not attempt to question him. Res. App. 2a.

Respondent appeared in court the following day, and an attorney was appointed to represent him. On July 28, 1989, the drug charges were dismissed at the preliminary hearing. Respondent remained in custody because of an unrelated juvenile matter. Res. App. 2a.

In August 1989, respondent was indicted on charges of possessing a controlled substance with intent to distribute it arising out of respondent's July 18, 1989, arrest. On September 27, 1989, he entered a plea of guilty to the lesser included offense of attempted possession of a controlled substance with intent to distribute it. Res. App. 2a.

Respondent remained in custody awaiting sentencing on the drug charge.[1] On January 4, 1990, a Metropolitan Police Department detective obtained an arrest warrant charging respondent with the unrelated 1988 murder of Cheaver Herriott. Also on January 4, 1990, an order was obtained by the United States Attorney's Office requiring the United States Marshal to release the respondent from custody to an Officer of the Metropolitan Police Department for the purpose of booking, fingerprinting, photographing and processing the respondent on the murder charge and at the conclusion of that processing to return

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[1] Respondent was held in the Youth Center at Lorton Reformatory while a study was performed to determine his suitability for treatment under the District of Columbia Youth Rehabilitation Amendment Act of 1985. Res. App. 2a; see D.C. Code Ann. §24-803(e) (1989). On February 26, 1990, respondent was sentenced to 15 months' incarceration under the Youth Rehabilitation Act. Res. App. 2a.

the respondent "forthwith" to the custody of the United States Marshal.

At the motions hearing the respondent testified that at around 4:00 a.m. on January 5, 1990, the respondent was taken from his sleep and transported to the Superior Court of the District of Columbia arriving there at approximately 6:00 a.m. Res. App. C 56. Respondent was held in the courthouse until 10:17 a.m. at which time two police officers took him into their custody. According to the respondent he was then placed in a paddy wagon where he waited approximately 10 minutes and was then transported to 300 Indiana Avenue, Washington, D.C. Respondent waited in the paddy wagon at 300 Indiana Avenue for approximately 30 minutes and was then transported back to the Superior Courthouse. Respondent waited in the paddy wagon at the Superior Courthouse for approximately 30 minutes and was then transported again to 300 Indiana Avenue where he waited an additional 30 minutes and was then taken to the Homicide Branch of the Metropolitan Police. Res. App. C 58-60.

At the motions hearing the respondent also testified that upon entering the Homicide Branch he asked the police officer for his attorney. Res. App. C 60. No lawyer was provided. The police officer directed the respondent to "sign this," referring to a PD 47 rights card. Res. App. C 61-62. The detective told him, "You can make this hard on yourself or make it easy. We got you for Kevin Henson too, you are a suspect in that case. If you don't tell us something about Jamaican Tony, you are going to get charged for both of these cases." Res. App. C, p. 62. The respondent was afraid. He agreed to waive his rights and make a statement.

Respondent was indicted for murder. He moved to suppress his confession, claiming that it was involuntary and that it had been obtained in violation of *Edwards v. Arizona*, 451 U.S. 477 (1981).

The trial court initially denied respondent's motion. Res. App. B 19a-30a. The court first rejected respondent's contention that his confession was involuntary. After hearing testimony from Detective Donald Gossage of the Metropolitan Police Department concerning the circumstances surrounding respondent's waiver of his *Miranda* rights, the trial court found that "as between those two accounts, that is the account given by [respondent] and Detective Gossage, the Court credits Detective Gossage's account." Res. App. B 20a. The trial court stated:

> Having make this credibility finding which leads the Court to conclude that [respondent] was brought to the Homicide Office of the police department, was given his Miranda Rights in the way in which Detective Gossage testified they were given on the stand, that [respondent] understood his rights and that he appreciated them and thereafter waived them, the Court finds no basis to suppress any of these statements on the ground that they were given in violation of Miranda or were involuntarily made.

Id. at 21a-22a.

With respect to respondent's *Edwards* claim, the court noted that an "extraordinary amount of time" had elapsed between respondent's invocation of his right to counsel and his confession, and that respondent had had an opportunity to consult with counsel during that time.

Res. App. B 25a. Under those circumstances, the court concluded that "none of the reasons which underlie the [Supreme] Court's decision[s] which have addressed a criminal defendant's right to [counsel] under the [Sixth] Amendment and his right not to incriminate himself under [Fifth] Amendment, would be served by suppression of these statements." *Id.* at 26a.

Five days after the trial court's ruling, this Court decided *Minnick v. Mississippi*, 111 S.Ct. 486 (1990). In light of that decision, the trial court reconsidered its ruling on respondent's *Edwards* claim and ordered that respondent's confession be suppressed. The trial court stated:

> The Court is of the view that with the latest pronouncement from the Supreme Court, the highest Court of this land, given its interpretation of the decisions which preceded the case of *Arizona vs. Edwards*, (sic) that the decision requires suppression of the statement; that the Supreme Court has set up, as mandated, a brigiit, quote, unquote, bright line test, and that is one of the problems, in my view of bright line tests. They kind of do not permit for the type of individual consideration of the facts * * * .
>
> The record is clear as to what the Court has found to be the case here. And I suppose what is required is that whenever a person is in custody, the police must check to see whether counsel has been appointed, and then before questioning that person, confer with counsel.
>
> I believe that the Minnick Case requires this result, and so the Court reverses its ruling made on Friday and grants the motion, the defense motion to suppress the – all of the statements

> which were under consideration, both the oral statements to Detective Gossage, as well as the videotape memorialization of it. That's the Court's decision.

Res. App. B 31a-32a.

The District of Columbia Court of Appeals affirmed. Res. App. A 1a-18a. They "conclude[d] that the Supreme Court's teachings in this area so far do not countenance a departure from the "bright-line" rule of *Edwards* in the present circumstances." Res. App. A 2a. In explaining its conclusion the court stated that:

> "Preserving the integrity of an accused's choice to communicate with police only though counsel is the essence of *Edwards* and its progeny." *Patterson v. Illinois*, 487 U.S. 285, 291, 108 S.Ct. 2389, 2394, 101 L.Ed.2d 261 (1988). The Court has further explained that "[t]he merit of the *Edwards* decision lies in the clarity of its command and the certainty of its application," *Minnick*, 111 S.Ct. at 490; "the *Edwards* rule provides 'clear and unequivocal' guidelines to the law enforcement profession," *id* (citation and additional quotation marks omitted), and it "conserves judicial resources which would otherwise be expended in making difficult determinations of voluntariness." *Id.* at 489.

Res. App. A 5a-6a..

In reaching this conclusion the Court acknowledged that the respondent's case differed from *Edwards* and other cases decided by this Court in several ways.

First, that the "police reinitiated questioning only after the defendant had been furnished counsel and consulted with him in the drug case, and that the renewed questioning concerned a crime entirely unrelated to the one regarding which the defendant had refused to talk without counsel." Res. App. A 6a-7a. The court noted, however, that the second factor was present in *Minnick*, and the first factor was present in *Arizona v. Roberson*, 486 U.S. 675 (1988). The court rejected the government's reliance on those factors. In the court's view, to admit the challenged evidence in this case would require that *Minnick* and *Roberson* be "narrow[ed] * * * to their individual settings." Res. App. A 7a. The court went on to state that:

> * * * if *Edwards*, *Roberson*, and *Minnick* together teach anything, it is the need for great caution in finding distinctions among cases all involving the paradigmatic original request by the accused for counsel, reflecting "his own view that he is not competent to deal with the authorities without legal advice," *Roberson*, 486 U.S. at 681, 108 S.Ct. at 2098 (citation omitted). The Supreme Court having made clear that police-initiated questioning about a separate offense and questioning after opportunity to consult counsel each fails to justify departure from *Edwards'* "bright-line, prophylactic * * * rule," *id.* at 682, 108 S.Ct. at 2098, we are not convinced that in combination the Court would regard these two factors differently.

Res. App. A 8a.

Second, the court recognized that this case differs from the *Edwards* line of cases because there was a five-month interval between respondent's invocation of the

Edwards right to counsel and the subsequent interrogation. Res. App. A 8a-12a. The court stated that "[t]here is no question" that the danger of police badgering that the *Edwards* rule is designed to prevent "is reduced when the police have made no effort to interrogate the defendant for more than five months after his assertion of rights." *Id.* at 8a-9a. Although the court viewed this argument as "substantial" it stated that "there are weighty considerations on the other side of the ledger as well." Res. App. 9a. In explaining the court noted:

> In *Minnick*, although the relevant interval was only a matter of days, the Court emphasized "the coercive pressures that accompany custody and that may *increase* as custody is prolonged." 111 S.Ct. at 491 (emphasis added). Moreover, except for his ongoing contacts with his custodial caretakers, we must assume that [respondents]'s only contact with law enforcement officials (investigators and prosecutors) during this period was through, or in the presence of, his attorney. Hence there is nothing in the lapse of time itself from which to deduce that his original belief in his vulnerability to the pressures of custodial interrogation had diminished as he progressed through the steps of pleading guilty to the (lesser included) offense of attempted drug distribution; it is just as likely that his sense of dependence on, and trust in, counsel as the guardian of his interests in dealing with government officials intensified.
>
> Furthermore, with the government's argument based upon lapse of time we are again met with the Supreme Court's insistence that the *Edwards* rule be kept "clear and unequivocal."

Res. App. A 9a-10a. Footnote omitted.

Third, the court recognized that before the interrogation, respondent pleaded guilty to the offense with which he was charged when he invoked the *Edwards* right. Res. App. A 12a-14a. The court noted that this "might seem to be [the government's] most potent argument . . . one that promises adherence to the requirement of some form of bright-line rule." Res. App. A 12a. However, the court identified the actual issue as "whether by pleading guilty in the drug case defendant can be said to have 'reopened the dialogue with the authorities' within the meaning of *Edwards*, 451 U.S. at 486 n. 9, 101 S.Ct. at 1885, n. 9 so as to validate his waiver of rights and interrogation on the murder charge." Res. App. B 13a. The court concluded that the:

> [Respondent] pled guilty with the advice and assistance of counsel. Hence while the knowing and voluntary plea presumable demonstrated that acceptance of personal responsibility and not the pressures of custody caused him to incriminate himself, it also was consistent with his original election to deal with government officials only through an attorney. Indeed, from [respondent]'s viewpoint the fact that counsel had negotiated a plea to a lesser charge sparing him a mandatory-minimum sentence, D.C. Code §33-541(c)(1)(A) (1990 Supp.), would only have confirmed the wisdom of his choice to insist on the shield of legal representation. If [respondent] had other criminal involvement to conceal, or if he merely feared that he would be wrongly implicated in crimes committed by someone else, in either case we must assume he chose the shelter afforded by *Miranda* and *Edwards* to insure that the coercive pressures of

> custody did not cause him to incriminate himself. [Respondent]'s plea of guilty in the drug case, because it is consistent with his election to communicate with the police only through counsel, cannot be the pivotal break in events that *Edwards* demands before a waiver can be regarded as an initial election by the accused to deal with the authorities on his own.

Id. at 13a-14a.

SUMMARY OF ARGUMENT

Miranda v. Arizona, Edwards v. Arizona, Arizona v. Roberson, and *Minnick v. Mississippi* established a series of prophylactic rules designed to protect the Fifth Amendment privilege against compelled self-incrimination in the context of custodial interrogation. The Court has justified the creation of each of those rules on the ground that it protects the suspect against the inherently coercive pressures of interrogation in a police-dominated setting. This case presents three facts not explicitly addressed by the Court in *Miranda, Edwards, Roberson,* or *Minnick*. The petitioner seeks to dim or eliminate the "bright-line rule" established in *Miranda, Edwards, Roberson,* and *Minnick* because of these differences. Because the differences in these cases are insignificant, or have been already addressed by the Court the "bright-line rule" should not be changed.

First, the respondent entered a plea of guilty to the charge that prompted his invocation of the *Edwards* right to counsel before the police initiated interrogation. The respondent's waiver of his Fifth Amendment privilege

was done in the presence of and with the assistance of counsel. In pleading guilty to one offense the respondent did not waive his right to counsel to other offenses which he may have committed. The waiver to the Fifth Amendment in the context of a guilty plea cannot be construed as a waiver of his original advice to the authorities that he is not capable of dealing with the authorities without the assistance of counsel. The guilty plea therefore does not reopen the dialogue with the police.

Second, more than five months elapsed between respondent's assertion of the *Edwards* right to counsel and the initiation of interrogation by the police. The five month period of incarceration increased the pressures on the respondent making him more vulnerable to the coercion that can accompany custodial interrogation. An additional problem associated with incarceration is the tendency of the inmate to become institutionalized to the point where he responds affirmatively to all instructions of the authorities. Finally, any change in the "bright-line rule" that would make it dependent on the length of time between the request for counsel and the reinitiation of questioning would dim or eliminate the "bright-line rule."

Third, although this case differs minutely from *Arizona v. Roberson* and *Minnick v. Mississippi,* the difference(s) have already been addressed in those cases when those two cases are read together and nothing in this case should cause a change in the "bright-line rule." This case presents a situation where the defendant invokes his *Edwards* right, speaks with counsel and later is approached about a crime unrelated to the crime in which he asserted his *Edwards* right. In *Arizona v. Roberson,* the

suspect requested counsel and was reinterrogated before he had the opportunity to speak with counsel. In *Minnick v. Mississippi,* the suspect asserted his *Edwards* right was permitted to speak with counsel and was later interrogated about a different offense. When read together *Roberson* and *Minnick* address the set of circumstances of this case. Nothing in these two factual differences are sufficient to distinguish them from *Roberson* and *Minnick* and therefore cause a change in this Court's "bright-line rule."

ARGUMENT

THE "BRIGHT-LINE RULE" ESTABLISHED BY *EDWARDS V. ARIZONA,* SHOULD NOT BE CHANGED TO PERMIT LAW ENFORCEMENT OFFICERS TO INITIATE INTERROGATION OF A SUSPECT WHO HAS INVOKED HIS RIGHT TO COUNSEL FIVE MONTHS PREVIOUSLY IN CONNECTION WITH AN UNRELATED OFFENSE, WHERE THE SUSPECT CONSULTED WITH COUNSEL AND PLEADED GUILTY TO THE UNRELATED OFFENSE PRIOR TO THE INTERROGATION

In *Miranda v. Arizona,* 384 U.S. 436 (1966), the Court held that, prior to interrogation of a defendant who is in custody "or otherwise deprived of his freedom of action in any significant way," *id.* at 444 the police must warn him (1) that he has a right to remain silent; (2) that any statement he makes may be used as evidence against him; (3) that he is entitled "to consult with a lawyer and to have a lawyer with him during interrogation," *id.* at 471; (4) that an attorney will be appointed to represent him if

he cannot afford to retain one; and (5) that he may exercise any of these rights at any point during the interrogation. The Court went on to say that once an individual in custody invokes his right to counsel, interrogation "must cease until an attorney is present" at that point "the individual must have an opportunity to confer with the attorney and to have him present during any subsequent questioning." *Id.* at 474.

Edwards v. Arizona, 451 U.S. 477 (1981) gave force to the holding in *Miranda* finding it "inconsistent with *Miranda* and its progeny for the authorities, at their instance, to reinterrogate an accused in custody if he has clearly asserted his right to counsel." 451 U.S., at 485. In *Edwards,* the defendant invoked his right to counsel under *Miranda* after his arrest on state criminal charges. *Id.* at 478-479. The defendant was kept in custody and was not provided with counsel; the next day the police returned and attempted to interrogate him, despite his statement that he did not wish to speak with the police. *Id.* at 479. The defendant ultimately made an incriminating statement regarding his involvement in the offenses for which he had been arrested. The Court stated that "when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights." *Id.* at 484. Further this Court held that an accused who requests an attorney, "having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been

made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police." *Id.* at 484-485.

Edwards is "designed to prevent police from badgering a defendant into waiving his previously asserted *Miranda* rights." *Michigan v. Harvey*, 494 U.S. ___, ___, 110 S.Ct. 1176 (1990). *See also, Smith v. Illinois*, 469 U.S. 91, 98 (1984).

Following the prophylactic rule announced in *Edwards* this Court has decided two cases expanding the scope of the rule. The first of these cases is *Arizona v. Roberson*, 486 U.S. 675 (1988). In *Roberson* the defendant invoked his right to counsel after his arrest on a burglary charge. The defendant remained in custody and was not provided with an attorney; three days later, after again advising him of his *Miranda* rights, the police interrogated him about a different burglary. The *Roberson* Court stated:

> The *Edwards* corollary that if a suspect believes that he is not capable of undergoing such questioning without advice of counsel, then it is presumed that any subsequent waiver that has come at the authorities' behest, and not at the suspect's own instigation, is itself the product of the "inherently compelling pressures" and not the purely voluntary choice of the suspect. As Justice WHITE has explained, "the accused having expressed his own view that he is not competent to deal with the authorities without legal advice, a later decision at the authorities' insistence to make a statement without counsel's

> presence may properly be viewed with skepticism." *Michigan v. Mosley*, 423 U.S. 96, 110, n. 2, 96 S.Ct. 321, 829, n.2 (concurring in result).

Id. at 681-682

The *Miranda* and *Edwards* decisions have created a "bright-line rule" and this Court has "repeatedly emphasized the virtues of a bright-line rule in cases following Edwards as well as Miranda." *Arizona v. Roberson*, 108 S.Ct. 2098, and that the Court "like[s] them to be 'clear and unequivocal,'" *McNeil v. Wisconsin*, 111 S.Ct. 2204 (1991). *See also Michigan v. Jackson*, 475 U.S. 625, 634 (1986); *Smith v. Illinois*, 469 U.S. 91, 98 (1984) (*per curiam*); *Solem v. Stumes*, 465 U.S. 638, 646 (1984); see also *Shea v. Louisiana*, 470 U.S. 51 (1985); *Oregon v. Bradshaw*, 462 U.S. 1039, 1044 (1983) (plurality opinion) (Rehnquist, J.). In *Fare v. Michael C.*, 442 U.S. 707 (1979) Court explained:

> • • • relatively rigid requirement that interrogation must cease upon the accused's request for an attorney • • • has the virtue of informing police and prosecutors with specificity as to what they may do in conducting custodial interrogation, and of informing courts under what circumstances statements obtained during such interrogation are not admissible. This gain in specificity, which benefits the accused and the State alike, has been thought to outweigh the burdens that the decision in *Miranda* imposes on law enforcement agencies and the courts by requiring the suppression of trustworthy and highly probative evidence even though the confession might be voluntary under traditional Fifth Amendment analysis.

Id. at 718.

In *Roberson* the Court stated:

> • • • The *Edwards* rule thus serves the purpose of providing "clear and unequivocal" guidelines to the law enforcement profession. Surely there is nothing ambiguous about the requirement that after a person in custody has expressed his desire to deal with the police only through counsel, he "is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police."

Id. 486 U.S. 682.

The necessity of the bright-line rule in *Edwards* and the *per se* aspect of *Miranda* was explained by the Court in *Roberson* citing *Fare v. Michael C.*, 442 U.S. 707 (1979):

> The rule in *Miranda* . . . was based on this Court's perception that the lawyer occupies a critical position in our legal system because of his unique ability to protect the Fifth Amendment rights of a client undergoing custodial interrogation. Because of this special ability of the lawyer to help the client preserve his Fifth Amendment rights once the client becomes enmeshed in the adversary process, the Court found that 'the right to have counsel present at the interrogation is indispensable to the protection of the Fifth Amendment privilege under the system' established by the Court. [384 U.S.], at 469 [86 S.Ct., at 1625]. Moreover, the lawyer's presence helps guard against overreaching by the police and ensures that any statements actually obtained are accurately transcribed for presentation into evidence. *Id.*, at 470 [86 S.Ct., at 1625-1626].

> "The *per se* aspect of *Miranda* was thus based on the unique role the lawyer plays in the adversary system of criminal justice in this country." 442 U.S. at 719, 99 S.Ct., at 2568-2569.

Id. 486 U.S. 682 n. 4.

The second of the cases to expand the scope of *Edwards* was *Minnick v. Mississippi*, 111 S.Ct. 486 (1990). Where *Roberson* considered the unfulfilled request for counsel *Minnick* addressed the issue of the Fifth Amendment where the defendant had been afforded the opportunity to speak with counsel. In *Minnick*, the defendant invoked his right to counsel after he was arrested on a murder warrant. The defendant then had an opportunity to consult with an attorney although he remained in custody. Three days later, the police interviewed the defendant again about the murder where he eventually gave an incriminating statement. The Court suppressed the statements holding that "• • • the Fifth Amendment protection of *Edwards* is not terminated or suspended by consultation with counsel." *Id.* at 489 and that "In context, the requirement that counsel be 'made available' to the accused refers to more than an opportunity to consult with an attorney outside the interrogation room." *Id.* at 490. The Court emphasized that "counsel's *presence* at interrogation is not unique to *Edwards*. It derives from *Miranda*, where we said that in the cases before us "[t]he presence of counsel • • • would be the adequate protective device necessary to make the process of police interrogation conform to the dictates of the [Fifth Amendment] privilege. His presence would insure that statements made in the government-established atmosphere are not the product of compulsion" *Id.* at 490. *See also Fare v.*

Michael C. supra 442 U.S., at 719. *See also Oregon v. Bradshaw, supra* where the Court described the holding of *Edwards* to be "that subsequent incriminating statements made without [*Edwards*] attorney present violated the rights secured to the defendant by the Fifth and Fourteenth Amendments to the United States Constitution." *Id.* 462 U.S. 1039, 1043. *See also Shea v. Louisiana,* 470 U.S. 51, 52 (1985); *Patterson v. Illinois,* 487 U.S. 285 (1988).

Over fifty years ago in *Johnson v. Zerbst,* 304 U.S. 458 (1938) the Court stated that you should "indulge every reasonable presumption against waiver of fundamental constitutional rights." *Id.*, at 464. In *Michigan v. Jackson* 475 U.S. 625 the Court said that "Doubts must be resolved in favor of protecting the constitutional claim. This settled approach to questions of waiver requires us to give a broad, rather than a narrow, interpretation to a defendant's request for counsel." *Id.*, at 475 U.S. 633. In addressing the waiver issue the Court in *Edwards v. Arizona, supra,* stated:

> It is reasonably clear under our cases that waivers of counsel must not only be voluntary, but must also constitute a knowing and intelligent relinquishment or abandonment of a known right or privilege, a matter which depends in each case "upon the particula facts and circumstances surrounding that case, including the background, experience and conduct of the accused.

Id., at 451 U.S. 482. See also *Faretta v. California,* 422 U.S. 806 (1975); *North Carolina v. Butler,* 441 U.S. 359, 374-375 (1979); *Brewer v. Williams,* 430 U.S. 387, 405 (1977); *Fare v.*

Michael C., 442 U.S. 707, 724-725 (1979). Indeed, the ultimate holding in *Edwards* was "that when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights." 451 U.S. 484.

1. The *Edwards* rule, like other applications of *Miranda* "is not itself required by the Fifth Amendment's prohibition on coerced confessions, but is instead justified only by reference to its prophylactic purpose* * *" *Connecticut v. Barrett,* 479 U.S. 523, 528 (1987). The Court has repeatedly stated that the justification for the prophylactic rules established in *Edwards* and the cases following it is the need to "prevent police from badgering a defendant into waiving his previously asserted *Miranda* rights." *McNeil v. Wisconsin,* 111 S.Ct. 2204, 2208 (1991) (quoting *Michigan v. Harvey,* 494 U.S. 344, 350 (1990)); see *Minnick v. Mississippi,* 111 S.Ct. at 489; *Smith v. Illinois,* 469 U.S. 91, 98 (1984); *Oregon v. Bradshaw,* 462 U.S. 1039, 1044 (1983). The concern underlying the *Edwards* rule is that "[i]n the absence of such a bright-line prohibition, the authorities through 'badger[ing]' or 'overreaching' – explicit or subtle, deliberate or unintentional – might otherwise wear down the accused and persuade him to incriminate himself notwithstanding his earlier request for counsel's assistance." *Smith v. Illinois,* 469 U.S. 91, 98.[2]

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[2] The *Miranda* Court reviewed the techniques of persuasion and the psychological ploys listed, and specifically encouraged, in police policy manuals to increase the number of confessions. *Miranda v. Arizona,* 384 U.S. at 449-54. The Court concluded that

Relying on three separate factors "Taken singly or in conjunction" Pet. Brief 14. The petitioner seeks to dim or eliminate the "bright-line rule" of *Edwards*.

a. First, the petitioner argues, this case differs from the Court's previous *Edwards* cases because the respondent, after he requested counsel in the drug case but before he was interrogated about the murder, entered a plea of guilty to the drug charge that had prompted his invocation of the *Edwards* right to counsel.

A guilty plea "represents a break in the chain of events which has preceded it in the criminal process," *Tollett v. Henderson*, 411 U.S. 258, 267 (1973) and constitutes a waiver of the Fifth Amendment right not to be compelled to incriminate oneself. *Boykin v. Alabama*, 395 U.S. 238, 243 (1969); *McCarthy v. United States*, 394 U.S. 459, 466 (1969). *Edwards* itself does not make its prophylactic ban permanent. The accused can lift it by reinitiating conversation with the police about the crime. It is also true that the *Edwards'* presumption of involuntary waiver fades when the accused is released from custody.

"the very fact of custodial interrogation exacts a heavy toll on individual liberty and trades on the weakness of the individuals." *Id.* at 455 (footnote omitted). See also *Illinois v. Perkins*, 110 S.Ct. 239 (1990) (confirming the necessity of *Miranda's* protections during custodial interrogation); *Rhode Island v. Innis*, 446 U.S. 291, 299 (1980) (construing broadly "techniques of [p]ersuasion" as "interrogation" because "[t]he concern of the Court in *Miranda* was that the 'interrogation environment' created by the interplay of interrogation and custody would 'subjugate the individual to the will of his examiner' and thereby undermine the privilege against compulsory self-incrimination").

E.g. Dunkins v. Thigpen, 854 F.2d 394, 397 (11th Cir. 1988) *cert. denied* 489 U.S. 1059 (1989); *United States v. Skinner*, 667 F.2d 1306, 1309 (9th Cir. 1982), *cert. denied* 463 U.S. 1229 (1983); *People v. Trujillo*, 773 P.2d 1086, 1091-92 (Colo. 1989) (en banc).[3] Nevertheless, the real question is whether by pleading guilty in the drug case the respondent can be said to have "reopened the dialogue with the authorities" within the meaning of *Edwards*, 451 U.S. at 486 n. 9, 101 S.Ct. at 1885, n. 9, so as to validate his waiver of rights and interrogation on the murder charge.[4] Guilty pleas are accepted in accordance with Rule 11 of the District of Columbia Rules of Criminal Procedure. Nothing in a Rule 11 colloquy would indicate to the

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[3] The petitioner argues that "[t]he 'break in custody' cases are merely specific examples of a broader point: the irrebuttable presumption from *Edwards* should not apply when there is a significant change in the accused status prior to the interrogation." * * * Where the status of the accused has changed dramatically, as it does once he is released from custody or after an adjudication of guilt (whether after a guilty plea or after trial), the assumption that he wishes to have the assistance of counsel in all of his dealings with the police is much less compelling." Pet. Brief 17. This argument ignores the fact that the person who has pleaded guilty to an offense is now much more vulnerable to the authorities. A person having pleaded guilty and who is now awaiting sentencing is as much dependent on his attorney then he was prior to his plea. He is dependent on his attorney to argue for the lightest sentence possible and otherwise assist him at sentencing.

[4] "Guilty pleas have been carefully scrutinized to determine whether the accused knew and understood all the rights to which he would be entitled *at trial*, and that he had intentionally chosen to forgo them. *Schneckloth v. Bustamonte* 412 U.S. 238, 93 S.Ct. 2041 (1973) (emphasis supplied).

respondent that he is waiving his Fifth Amendment privilege except in the context of that case.[5] Clearly the entry of the guilty plea with his attorney present is consistent

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[5] Rule 11(c) of the District of Columbia Rules of Criminal Procedure states.

> (c) *Advice to defendant.* Before accepting a plea of guilty or nolo contendere, the Court must address the defendant personally in open court and inform the defendant of, and determine that the defendant understands, the following:
>
> (1) The nature of the charge to which the plea is offered, the mandatory minimum penalty provided by the law and, when applicable, that the Court may also order the defendant to make restitution to any victim of the offense; and
>
> (2) If the defendant is not represented by an attorney, that the defendant has the right to be represented by an attorney at every stage of the proceedings and, if necessary, one will be appointed to represent the defendant; and
>
> (3) That the defendant has the right to plead not guilty or to persist in that plea if it has already been made, the right to be tried by a jury and at that trial the right to the assistance of counsel, the right to confront and cross examine adverse witnesses, and the right against compelled self-incrimination; and
>
> (4) That if a plea of guilty or nolo contendere is accepted by the Court there will not be a further trial of any kind, so that by pleading guilty or nolo contendere the defendant waives the right to a trial; and
>
> (5) If the Court intends to question the defendant under oath, on the record, and in the presence of counsel about the offense to which the defendant has pleaded, that the defendant's answers may later be used against the defendant in a prosecution for perjury or false statement.

with his original desire to deal with the government through his attorney.

b. The second factor that the petitioner feels distinguishes that case from previous *Edwards* decisions is the five month interval between the respondent's invocation of his request for counsel and the subsequent interrogation. Admittedly *Edwards* is "designed to prevent police from badgering a defendant into waiving his previously asserted *Miranda* rights," *Minnick*, 111 S.Ct. at 489, and that that danger is reduced when the police have made no effort to interrogate the defendant for more than five months after his assertion of rights. In *Minnick*, although the relevant interval was only a matter of days, the Court emphasized "the coercive pressures that accompany custody and that may increase as custody is prolonged." 111 S.Ct at 491. As the Court of Appeals correctly noted:

> * * * Moreover, except for his ongoing contacts with his custodial caretakers, we must assume that [respondent]'s only contact with law enforcement officials (investigators and prosecutors) during this period was through, or in the presence of, his attorney. Hence, there is nothing in the lapse of time itself from which to deduce that his original belief in his vulnerability to the pressures of custodial interrogation had diminished as he progressed through the steps of pleading guilty to the (lesser included) offense of attempted drug distribution; it is just as likely that his sense of dependence on, and trust in, counsel as the guardian of his interests in dealing with government officials intensified.

Res. App. 10a.

As previously stated (Note 3, supra) having pleaded guilty the respondent is now more vulnerable to the authorities. He is placed in the position where, while awaiting sentencing, his actions can control the sentence the judge imposes. A negative report from the Pre-sentence report writer, the government or his custodians could well result in a longer sentence or the difference between a probationary sentence or incarceration. At the motions hearing the respondent testified that his daily routine included "go[ing] to my programs as in schooling and go to see my C and P officer as – to see if I am going to be recommended the Youth Act or recommended for probation." Res. App. C-56.[6]

Additionally, the prolonged incarceration of the respondent leads to an additional problem. As custody is prolonged the respondent becomes institutionalized by the incarceration. The respondent is told when to get up, when to sleep, when to eat, when to bathe. All his movements are controlled by the prison officials. In this atmosphere the person would feel compelled to continue to abide by the instructions of those in authority.

Finally, the petitioner's argument that the lapse of time distinguishes this case would eliminate the "bright-line rule" that the Court has created and this Court has

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[6] Compare this situation to the "cruel trilemma of self-accusation, perjury or contempt," that this Court said faced the suspect in *Pennsylvania v. Muniz*, 110 S.Ct. 2638 (1990). Muniz was stopped for drunk driving and was asked to answer questions regarding the date of his sixth birthday which he could not remember. This Court found that the answer to that question was testimonial in nature and that since he had not been advised of his *Miranda* rights it was inadmissible.

"repeatedly emphasized the virtues of a bright-line rule in cases following *Edwards* as well as *Miranda*. *Arizona v. Roberson*, 108 S.Ct. 2098 and that the Court "like[s] them to be 'clear and unequivocal,' " *McNeil v. Wisconsin*, 111 S.Ct 2204 (1991).[7]

c. Finally, the petitioner argues that this case differs from the Court's earlier *Edwards* rulings because respondent was approached by the police concerning the murder only after his previous request for counsel in connection with the drug offense had been honored. Respondent was provided with counsel and had consulted with his lawyer months before the police sought to question him about the murder, which was wholly unrelated to the drug charge that had prompted his invocation of the *Edwards* right. The distinction relied upon is that in *Arizona v. Roberson* the police reinitiated interrogation without honoring the suspect's request for counsel and in *Minnick v. Mississippi* the renewed interrogation concerned the same offense that had prompted the suspect's invocation of the right to counsel. *Minnick* and *Roberson* read together must control this case. This distinction that the petitioner relies upon was addressed by the Court of Appeals.

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[7] In their brief as *Amicus Curiae*, the District of Columbia proposes that in situations where the suspect has asserted his right to counsel and a sufficient period of time has elapsed since the assertion of the right that the police be permitted to interrogate the suspect on a different offense after fully advising him of his *Miranda* rights. The validity of the waiver would be determined on the totality of the circumstances. This proposal would eliminate, entirely, the "bright-line rule" in those situations involving questioning on two separate offenses.

> But if *Edwards, Roberson* and *Minnick* together teach anything, it is the need for great caution in finding distinctions among cases all involving the paradigmatic original request by the accused for counsel, reflecting "his own view that he is not competent to deal with authorities without legal advice,": *Roberson,* 486 U.S. at 6811, 108 S.Ct. at 2098 (citation omitted). The Supreme Court having made clear that police initiated "Questioning about a separate offense and questioning after opportunity to consult counsel each fails to justify departure from *Edwards'* " bright-line, prophylactic * * * *id.* at 682, 108 S.Ct. at 2098, we are not convinced that in combination the Court would regard these two factors differently.

Res. App. A 8a.

2. Nothing in the facts of this case significantly distinguish it from *Edwards, Roberson,* or *Minnick.* In those cases the Court has established a "bright-line rule" to clearly and unequivocally tell police officers that after a suspect has stated that he is unwilling to talk to the police without an attorney present that questioning must cease until an attorney is present. The rule recognizes the importance that an attorney plays in the adversarial process and the dangers inherent in custodial interrogation. The costs associated with this rule are minor. If this case extends *Edwards* at all it would only be in the situation where a suspect has indicated his desire to deal with the police only through counsel and the suspect has been in continuous custody since announcing that desire. On the other hand it maintains the clarity of the Court's "bright-line rule."

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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No. 91-1521

In the Supreme Court of the United States

OCTOBER TERM, 1992

UNITED STATES OF AMERICA, PETITIONER

v.

LOWELL GREEN

ON WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

REPLY BRIEF FOR THE UNITED STATES

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ON WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

REPLY BRIEF FOR THE UNITED STATES

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1. Respondent asserts (Resp. Br. 26) that nothing in the facts of this case distinguishes it from this Court's decisions in *Edwards* v. *Arizona*, 451 U.S. 477 (1981), *Arizona* v. *Roberson*, 486 U.S. 675 (1988), and *Minnick* v. *Mississippi*, 111 S. Ct. 486 (1990). Contrary to respondent's assertion, the facts of this case are critically different from the facts of each of the cases on which respondent relies. Respondent invoked his right not to be questioned in the absence of counsel following his arrest on a drug

charge; he subsequently obtained counsel and entered a plea of guilty to that charge; several months later, he was questioned about the murder at issue in this case; before questioning him about the murder, the police advised him of his *Miranda* rights; he waived those rights and voluntarily agreed to speak with the police.

Three important points emerge from these facts. First, the drug charge that provoked respondent's invocation of his right not to be questioned in the absence of counsel had been resolved by a plea of guilty long before the police approached respondent with respect to the murder allegation. Second, more than five months elapsed between respondent's invocation of his right to counsel and the reinitiation of interrogation by the police. Third, the murder allegation was wholly unrelated to the drug charge as to which respondent had declined to be questioned in the absence of counsel, and in fact respondent had been provided with counsel in connection with the drug charge. Under these circumstances, there is no justification for holding that the Constitution requires the courts to presume, irrebuttably, that respondent's agreement to speak with the police about his involvement in the murder was the product of official coercion.

a. Respondent contends (Resp. Br. 20-23) that in spite of his decision to plead guilty to the drug charge, there should still be an irrebuttable presumption, as there was in *Edwards*, that his agreement to speak with the police was the product of coercion. The *Edwards* presumption should continue to apply after his guilty plea, respondent argues, because "entry of the guilty plea with his attorney present is consistent with his original desire to deal with the

government through his attorney." Resp. Br. 22-23. The amici supporting respondent likewise contend (Public Defender Br. 16-28) that respondent's guilty plea is irrelevant to the *Edwards* presumption, because the guilty plea was neither a waiver of the right to counsel during custodial interrogation nor a reinitiation of discussions with the police.

Respondent and his amici misconstrue our argument. As we explain in our opening brief (at 16), we agree with respondent and his amici that "a guilty plea is not necessarily inconsistent with a continuing desire to deal with the government only through counsel." But we disagree with respondent's suggestion that *Edwards*' irrebuttable presumption can be lifted only by an event that conclusively establishes that the suspect has decided to speak with the police in counsel's absence. That suggestion is disproved by the "break in custody" cases. A break in custody, like a guilty plea, does not conclusively establish that a suspect wishes to speak to the police directly. The courts nevertheless have held that a break in custody marks a significant change in the suspect's circumstances, and that it is no longer reasonable to presume, irrebuttably, that any decision to submit to police questioning is the product of coercion. See Pet. Br. 16 (collecting cases).

The same reasoning applies here. As respondent acknowledges, a guilty plea is "a break in the chain of events which has preceded it in the criminal process," Resp. Br. 20 (quoting *Tollett* v. *Henderson*, 411 U.S. 258, 267 (1973)), and "constitutes a waiver of the Fifth Amendment right not to be compelled to incriminate oneself." Resp. Br. 20 (citing *Boykin* v. *Alabama*, 395 U.S. 238, 243 (1969)). Given the dramatic change in a suspect's circum-

stances after he pleads guilty to the charge on which he requested counsel, it is unreasonable to presume, irrebuttably, that any subsequent decision to respond to questioning on a different subject is the product of police coercion.[1]

b. Unlike the suspects in this Court's previous *Edwards* cases, respondent was not subjected to repeated police interrogation within a period of a few days. Instead, the police made no effort to interrogate respondent for more than five months after he declined to be questioned in the absence of counsel. Respondent acknowledges that the purpose of the *Edwards* rule is to "prevent police from badgering a defendant into waiving his previously asserted *Miranda* rights." Resp. Br. 19 (quoting *McNeil* v. *Wisconsin*, 111 S. Ct. 2204, 2208 (1991), quoting, in turn, *Michigan* v. *Harvey*, 494 U.S. 344, 350 (1990)). Respondent also concedes (Resp. Br. 23) that the "danger [of badgering] is reduced when the police have made no effort to interrogate the defendant for more than five months after his assertion of rights." Because a suspect who is approached for questioning only twice in five months is unlikely to feel badgered, there is no justification for applying a "perpetual" *Edwards* presumption to suspects in respondent's circumstances.

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[1] Although we submit that the *Edwards* presumption ceases to apply in that setting, the suspect's right not to incriminate himself remains protected by the requirements of *Miranda*. If the police seek to question the suspect, they must repeat the *Miranda* warnings, and any waiver of the suspect's Fifth Amendment rights must be voluntary, knowing, and intelligent. See *Johnson* v. *Zerbst*, 304 U.S. 458, 464 (1938). Those protections were afforded to respondent in this case.

Respondent contends (Resp. Br. 24) that "[a]s custody is prolonged the respondent becomes institutionalized by the incarceration" and "feel[s] compelled to continue to abide by the instructions of those in authority." Respondent offers no support for that sweeping assertion. If respondent's assertion were correct, it would suggest that all statements obtained from suspects who have been in custody for a significant period of time are involuntary and therefore inadmissible. No court has adopted such a rule. Indeed, the lower courts have drawn the opposite conclusion about extended periods of custody: they have recognized that restraints on an inmate's liberty are a constant feature of prison life and become familiar to the inmate. Consequently, those restraints are unlikely to have the coercive effect that the *Miranda* rules are intended to dispel. See *United States* v. *Cooper*, 800 F.2d 412, 414-415 (4th Cir. 1986); *United States* v. *Scalf*, 725 F.2d 1272, 1275-1276 (10th Cir. 1984); *Cervantes* v. *Walker*, 589 F.2d 424, 428 (9th Cir. 1978).[2]

Respondent's principal objection to placing a time limit on the *Edwards* presumption is that it would

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[2] Respondent also contends (Resp. Br. 24) that he was particularly vulnerable to the authorities because he was awaiting sentencing on a drug charge. But that claim is not relevant to the question whether respondent felt badgered when the police approached him about the murder. It is relevant, of course, to the question whether respondent's subsequent waiver of his *Miranda* rights and confession were voluntary. As to that question, however, the trial court correctly concluded that respondent's waiver and confession were voluntary, and respondent has not challenged that conclusion either in the court of appeals or in this Court.

"dim or eliminate the 'bright-line rule' established in *Miranda*, *Edwards*, *Roberson*, and *Minnick*." Resp. Br. 10. See also *id.* at 24-25. In fact, however, a rule that the *Edwards* presumption lasts as long as the suspect remains in custody has only the appearance of clarity. What is important is not whether a rule can be easily stated, but whether the rule gives workable guidance to police officers. The perpetual and all-encompassing rule that respondent advocates is not workable.

Suspects often commit multiple crimes, and it is not unusual for persons in custody for one offense to become suspects in other cases. Suspects or prisoners are often transferred from one jail or prison to another, and they may be questioned at different times by officers from various federal, state, and local law enforcement agencies. It would often be difficult for law enforcement officers to determine whether a suspect in long-term custody has requested counsel at any time, in any place, during interrogation by any official. The "bright-line rule" suggested by respondent thus would not provide clear guidance to law enforcement officials charged with applying it and therefore lacks the chief virtue of a bright-line rule.

Even in its current applications, *Edwards* does not provide a simple and determinate set of rules, as respondent suggests. In applying *Edwards*, the police—and courts reviewing the actions of the police—are regularly confronted with difficult questions, such as (1) whether the suspect is "in custody" for *Miranda* purposes, see *Berkemer* v. *McCarty*, 468 U.S. 420 (1984); *Oregon* v. *Mathiason*, 429 U.S. 492 (1977); *Beckwith* v. *United States*, 425 U.S. 341 (1976); (2) whether the activity at issue amounts to "interrogation" within the scope of the *Miranda* rules, see *Pennsylvania* v. *Muniz*, 496 U.S. 582 (1990); *Arizona* v. *Mauro*, 481 U.S. 520 (1987); *Rhode Island* v. *Innis*, 446 U.S. 291 (1980); (3) whether the suspect has "invoked" the right to counsel, see *McNeil* v. *Wisconsin*, 111 S. Ct. 2204; *Connecticut* v. *Barrett*, 479 U.S. 523 (1987); *Smith* v. *Illinois*, 469 U.S. 91 (1984); and (4) whether a suspect who initially requested counsel has surrendered that right by "initiating" further conversation with the police, see *Oregon* v. *Bradshaw*, 462 U.S. 1039 (1983). Thus, respondent's argument in favor of maintaining a bright-line rule at any cost is based on the false premise that *Edwards* provides clear guidance in those cases that it governs.

Even if it were true that placing a time limit on the *Edwards* presumption would decrease the clarity of the rules governing custodial interrogations, the Court has emphasized that prophylactic rules should be "'clear and unequivocal' * * * only when they guide sensibly," and it has not hesitated to limit the prophylactic rules of *Miranda* and *Edwards* where "clear and unequivocal rules" would "do much more harm than good." *McNeil*, 111 S. Ct. at 2211. See *New York* v. *Quarles*, 467 U.S. 649, 658 (1984) (adopting exigent circumstances exception to *Miranda* even though the exception "to some degree * * * lessen[s] the desirable clarity of that rule."). A rule that turns the *Edwards* presumption into "a laser, burning inexorably through form and substance into infinity" would not be sensible, and would do much more harm than good. *Kochutin* v. *State*, 813 P.2d 298, 310 (Alaska 1991) (Bryner, C.J., dissenting). Consequently, placing some limits on the *Edwards*

rule is justified even if it would entail some loss of the "bright-line" quality of that rule.

c. Respondent concedes (Resp. Br. 25) that this case differs from *Arizona* v. *Roberson* because the police honored respondent's request for counsel before reinitiating interrogation; he concedes that it differs from *Minnick* v. *Mississippi* because the interrogation concerned a completely unrelated offense. Nonetheless, respondent argues that this case is controlled by *Minnick* and *Roberson*, because in each of those cases the Court rejected one of the distinctions between this case and *Edwards*. But the separate rejection of each distinction does not require suppression of a confession in a case in which both distinctions are present. The fact that counsel was made available to respondent eliminated the coercive pressures that arise when the police seek to reinitiate interrogation of a "suspect who has been denied the counsel he has clearly requested." *Roberson*, 486 U.S. at 686 & n.6. And the fact that the questioning concerned an unrelated offense minimized the risk that respondent would be badgered into making a statement by repeated police-initiated questioning. See *Minnick*, 111 S. Ct. at 491. Thus, because the concerns that prompted the Court's decisions in *Roberson* and *Minnick* are not present here, those cases do not justify application of the *Edwards* presumption in the circumstances of this case.

2. Respondent's amici contend (Public Defender Br. 34-41) that the *Edwards* rule should be applied in this case because the government had committed itself to prosecute respondent at the time the police initiated the interrogation. That argument, which is based on Sixth Amendment principles, is inapposite here.

In the first place, the Sixth Amendment right to counsel is not at issue in this case. The court of appeals held (Pet. App. 3a-4a n.1) that this case presents "no issue of violation of [respondent's] right to counsel under the Sixth Amendment." As amici concede (Public Defender Br. 36 n.10), respondent "has not sought review of that holding." Moreover, our petition presented the single question "[w]hether *Edwards* * * * requires the suppression of [respondent's] confession * * *." Pet. i. Amici are not entitled to present additional questions. *United Parcel Service, Inc.* v. *Mitchell*, 451 U.S. 56, 60 n.2 (1981); *Bell* v. *Wolfish*, 441 U.S. 520, 531-532 n.13 (1979).[3]

In any event, respondent's Sixth Amendment right to counsel on the murder charge had not attached at the time of the interrogation. Respondent had not been indicted, arraigned, or presented on the murder charge at the time of the interrogation. Although amici contend that the filing of a complaint and the issuance of an arrest warrant are sufficient to commence formal adversary proceedings in the District of Columbia, the court of appeals held to the contrary. Pet. App. 3a-4a n.1. The federal courts of appeals that have considered this issue under the Federal Rules of Criminal Procedure—which are virtually identical to the rules applicable in the District of Columbia—have reached the same conclusion. See *United States* v. *Pace*, 833 F.2d 1307, 1310-1312 (9th Cir. 1987), cert. denied, 486 U.S. 1011 (1988);

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[3] The applicability of *Miranda* rules, including *Edwards*, depends on whether the suspect is subjected to custodial interrogation, not on whether the government has initiated formal adversary proceedings as to the offense at issue. See *McNeil* v. *Wisconsin*, 111 S. Ct. at 2208.

United States v. *Duvall*, 537 F.2d 15, 20-22 (2d Cir.), cert. denied, 426 U.S. 950 (1976); cf. *United States* v. *Reynolds*, 762 F.2d 489, 493 (6th Cir. 1985) (Sixth Amendment right to counsel does not attach merely because unexecuted arrest warrant has issued).[4]

Amici's reliance on *Marrow* v. *United States*, 592 A.2d 1042 (D.C. 1991), is misplaced. In that case, the court of appeals considered D.C. Code provisions requiring that once the United States Attorney has "charged" a defendant "who is sixteen years of age or older" with assault with intent to commit murder while armed, the defendant must be prosecuted as an adult for any "subsequent delinquent act." D.C. Code §§ 16-2301(3)(A)(i); 16-2307(h) (1989). Relying on the language and purpose of the statute at issue, the court concluded that the date on which the defendant is "charged" for purposes of that statute is "the date on which the judge signed and filed the arrest 'warrant' based upon a criminal 'complaint' signed by a police officer and a supporting 'affidavit' signed by the police officer and 'approved' by an Assistant United States Attorney." 592 A.2d at 1043. The court, however, expressly noted that

> [o]ur interpretation of the phrase "charged by the United States attorney" should not be confused with interpretation of the term "charged" when used in other contexts. The Sixth Amendment right to counsel, for instance, attaches "at

[4] Although the decisions applying state law are less uniform, that is not surprising in view of the fact that a complaint serves different purposes in different States. See 1 W. LaFave & J. Israel, *Criminal Procedure* § 6.4(e), at 466-468 (1984 & 1991 Supp.).

> or after the initiation of adversary judicial proceedings—whether by way of formal *charge*, preliminary hearing, indictment, information, or arraignment." * * * However, the constitutional right to counsel at all critical stages of a prosecution reflects different policy goals from those involved in triggering the automatic transfer of jurisdiction from the Family Division to the Criminal Division, * * * and thus does not inform our decision here.

592 A.2d at 1046 n.9. The court of appeals' statement is consistent with this Court's recognition that an accused may be treated as "charged" for different purposes at different stages of the criminal process. See *United States* v. *Gouveia*, 467 U.S. 180, 190 (1984) (explaining that the Sixth Amendment right to a speedy trial, unlike the Sixth Amendment right to counsel, may attach "before an indictment and as early as the time of 'arrest and holding to answer a criminal charge,'" because the speedy trial right and the right to counsel protect different interests).

3. Finally, respondent is wrong in asserting (Resp. Br. 26) that "[t]he costs associated with [applying the *Edwards*] rule [in this case] are minor." The Court has recognized that "[a]dmissions of guilt * * * are essential to society's compelling interest in finding, convicting, and punishing those who violate the law." *Moran* v. *Burbine*, 475 U.S. 412, 426 (1986). As interpreted by the court of appeals, the *Edwards* rule would permanently foreclose all police-initiated interrogation of persons in custody who request counsel. Because many offenders who are held in long-term custody have committed multiple crimes, such a rule would impose a particularly high cost in restricting police questioning.

This case provides a striking example of the costs that society would incur from an over-expansion of the *Edwards* rule. Respondent confessed to his role in a murder. Both courts below concluded that the confession was voluntary, knowing, and intelligent; there is no indication that the confession was the product of "badgering" or any other form of police misconduct. If respondent's confession is nevertheless suppressed, it is entirely possible that a murderer will go unpunished. Because a case such as this one evokes none of the concerns that gave rise to the decisions in *Miranda* and *Edwards*, the costs of applying *Edwards* in this context far outweigh any benefits that might be obtained from further expanding the scope of the *Edwards* rule.

For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

AUGUST 1992

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No. 91-1521

In The
Supreme Court of the United States
October Term, 1991

UNITED STATES OF AMERICA,
Petitioner,

vs.

LOWELL GREEN,
Respondent.

ON WRIT OF CERTIORARI
TO THE DISTRICT OF COLUMBIA
COURT OF APPEALS

BRIEF AMICI CURIAE OF AMERICANS FOR EFFECTIVE LAW ENFORCEMENT, INC., JOINED BY THE NATIONAL DISTRICT ATTORNEYS ASSOCIATION, INC. IN SUPPORT OF THE PETITIONER.

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BRIEF AMICI CURIAE OF AMERICANS FOR EFFECTIVE LAW ENFORCEMENT, INC., JOINED BY THE NATIONAL DISTRICT ATTORNEYS ASSOCIATION, INC. IN SUPPORT OF THE PETITIONER.

This brief is filed pursuant to the Rules of the United States Supreme Court. Consent to file has been granted by respective Counsel for the Petitioner and Respondent. The letters of consent have been filed with the Clerk of this Court, as required by the Rules.

INTEREST OF AMICI CURIAE

Americans for Effective Law Enforcement, Inc. (AELE), as a national not-for-profit citizens organization, is interested in establishing a body of law making the police effort more effective, in a constitutional manner. It seeks to improve the operation of the police function to protect our citizens in their life, liberties, and property, within the framework of the various State and Federal Constitutions.

AELE has previously appeared as *amicus curiae* over eighty-five times in the Supreme Court of the United States and over thirty-five times in other courts, including the Federal District Courts, the Circuit Courts of Appeal and various state courts, such as the Supreme Courts of California, Illinois, Ohio, and Missouri.

The National District Attorneys Association, Inc. (NDAA), is a nonprofit corporation and the sole national membership organization representing state and local prosecuting attorneys in America. Since its founding in 1950, NDAA's programs of education, training, publication, and *amicus curiae* activity have carried out its guiding purpose of reforming the criminal justice system for the benefit of all of our citizens.

STATEMENT OF FACTS

The court below, *U. S. v. Green,* 592 A.2d 985 (D.C. App. 1991), held that, in accordance with the rule of *Edwards v. Arizona,* 451 U.S. 499 (1981), and *Arizona v. Roberson,* 486 U.S. 675 (1988), the respondent's (hereinafter referred to as defendant) invocation of the Fifth Amendment right to counsel during custodial interrogation bars further police-initiated interrogation about an unrelated offense, even when a continuously incarcerated defendant has consulted with counsel concerning a first offense to which he had pled guilty.

ARGUMENT

EDWARDS V. ARIZONA DOES NOT REQUIRE SUPPRESSION OF A VOLUNTARY CONFESSION BECAUSE LAW ENFORCEMENT OFFICERS INITIATED INTERROGATION OF A SUSPECT FIVE MONTHS AFTER HE HAD INVOKED HIS RIGHT TO COUNSEL REGARDING AN UNRELATED OFFENSE.

TO OBVIATE THE FUTILITY OF SEEKING A RECONCILIATION OF THE VARIOUS CASES DEALING WITH THE INTRINSIC PROBLEM PRESENTED IN THE INSTANT CASE, THIS COURT SHOULD ADOPT A MODIFICATION OF THE MANDATES OF *MIRANDA V. ARIZONA*. THE MODIFICATION WE URGE UPON THE COURT WOULD ACTUALLY CONSTITUTE A "BRIGHT LINE" GUIDE FOR THE POLICE AND THE LOWER COURTS.

In the Court's grant of certiorari the question presented was with respect to the application in this case of the "bright line rule" of *Edwards v. Arizona,* 451 U.S. 499 (1981), and *Arizona v. Roberson,* 486 U.S. 675 (1988). *Amici* submit that rather than reiterate the analysis and views expressed in our *amicus* brief in *Roberson*, or attempt a discussion of the

"bright line" concept, we here wish to offer a broader and more basic approach, one that can avoid the problem addressed in *Roberson* and in many other similar cases that have resulted from the application of the mandates of *Miranda v. Arizona,* 384 U.S. 436 (1966).

As background for the proposal, we ask the Court's indulgence to first consider the following excerpts from a study published in 1987. It involved a tabulation and commentary regarding the extent to which appellate court consideration was given, from 1966 through 1986, to *Miranda* issues, by this Court, the Federal Circuit Courts of Appeal, and, as a state example, the Appellate Courts of California. The study sought to answer the question: "Miranda v. Arizona - Is It Worth the Cost?"[1]

Summary Of Survey Results

[Supreme Court of the United States]

From 1966 through 1986, substantive *Miranda* issues were considered in forty-four cases, for a total of 606 printed pages in the official United States reports, consisting of approximately 160,000 words. The government prevailed in 31 of the cases and the contesting party in 13.

(Since 1986 through June 1987, the Supreme Court rendered three additional *Miranda* decisions, in which the government prevailed in all of them. The opinions in the three new cases cover forty-six pages and contain approximately 12,000 words. The total number of cases, therefore, exclusive of *Miranda* itself, amounts to forty-seven, with 652 pages and 172,000 words.)

[1] 24 *Calif. Western Law Rev.* 185-200 (1987-1988).

[No tabulation has been made since 1987.]

It was once thought that after the initial impact of *Miranda,* the various issues that might arise from it would soon be resolved by the Supreme Court in other cases. The prediction was that there would be an eventual diminution of litigation over *Miranda's* requirements not only in the Supreme Court, but also in lower federal appellate courts, and in the state appellate courts as well. As reasonable as that assumption may have been, the facts are to the contrary . . . [T]he number of *Miranda* issue cases decided by the Supreme Court has actually increased during the twenty year period since its inception, along with substantial increases in the number of pages and words in the opinions disposing of them.

[United States Circuit Courts of Appeal]

Miranda issues were discussed in 980 cases decided during the period 1966-1986. The opinions consisted of 2,155 pages and approximately 1,200,000 words. The prosecution prevailed in 803 cases, the defense in 177.

[No tabulation since 1987.]

[California Courts of Appeal]

The California courts of appeal decided 363 cases from 1966 through 1986, for a total of 905 pages and approximately 450,000 words, dealing solely with substantive *Miranda* issues. The prosecution prevailed in 281 cases, the defense in 82.

[No tabulation since 1987.]

[No attempt was made in the study to ascertain the frequency with which *Miranda* issues were decided at the trial court level, nor was it feasible to do so. Nevertheless, judging from the appellate court fre-

quency, it can reasonably be presumed to be extraordinarily high.]

Commentary

* * *

[*An Example of Confusion Regarding Miranda*]

United States v. Mesa, [638 F.2d 582 (1980)] decided by the Third Circuit Court of Appeals in 1980, involved the twin issues of "custody" and "interrogation" within the meaning of *Miranda's* mandate. The defendant had been a fugitive on an arrest warrant for the shooting of his daughter and his common law wife. He was located by the FBI in a motel room where he had barricaded himself. An FBI agent called to him repeatedly on a bullhorn, urging him to come out. He refused, but agreed to talk on a mobile phone to an FBI negotiator. Their conversation was recorded and in it the suspect made some incriminating statements, after which he peacefully surrendered. A United States district court suppressed the statements on the ground that they were made in a custodial situation, without the suspect having received the *Miranda* warnings. On appeal the circuit court reversed in a two to one decision. The chief judge concluded that "where an armed suspect who possibly has hostages barricades himself away from the police, he is not in custody [within] the meaning of the *Miranda* rule." Another judge concluded that the FBI agent's conversation with the suspect did not constitute interrogation, and for that reason the warnings were not required. The third judge dissented because he concluded that there was *both* custody and interrogation, thus necessitating the warnings.

If, as in *Mesa,* three federal appellate court judges come to three different conclusions as to whether

"interrogation" and "custody" existed in a specific case situation, is it not unreasonable to expect law enforcement officers to make the required appraisals under conditions where they do not have the luxuries of time for deliberation or the availability of library facilities and the skill to use them?

* * *

[*Gross Misconceptions*]

There is a gross misconception, generated and perpetuated by fiction writers, movies, and television, that if criminal investigators carefully examine a crime scene, they will almost always find a clue that will lead them to the offender; and that, furthermore, once the criminal is located, he will shunt aside his self-preservation instinct and readily confess or otherwise reveal guilt, as by attempting to escape. This however, is pure fiction. As a matter of fact, the art and science of criminal investigation has not yet developed to a point where the search for and the examination of physical evidence will always, or even in most cases, reveal a clue to the identity of the perpetrator or provide the necessary legal proof of guilt. In criminal investigations, even of the most efficient type, there are many, many instances where physical clues are entirely absent, and the only approach to a possible solution of the crime is the interrogation of the criminal suspect himself, as well as of others who may possess significant information.

* * *

The majority opinion in *Miranda* attributes to the Federal Bureau of Investigation a practice consistent with what the Court mandated in that case for *all* police interrogators. It suggested that "the practice of the FBI can readily be emulated by state and local law enforcement agencies." Two basic flaws are present in that conclusion. First, as Justice Harlan, one of the

four dissenting Justices, pointed out, the FBI's interrogation practices were considerably short of *Miranda's* formalistic rules: "For example, there is no indication that FBI agents must obtain an affirmative 'waiver' before they pursue their questioning. Nor is it clear that one invoking his right to silence may not be prevailed upon to change his mind. And the warning as to appointed counsel apparently indicates only that one will be assigned by the judge when the suspect appears before him . . ."

* * *

[*The "Guiding Hand" of Counsel*]

Once a lawyer enters upon an interrogation scene, he will very rarely do anything more than instruct his client to keep his mouth shut. As the late Supreme Court Justice Jackson stated in a 1948 case, "[t]o bring in a lawyer means a real peril to the solution of the crime . . . Any lawyer worth his salt will tell the suspect . . . to make no statement to police under any circumstances." *Watts v. Indiana,* 338 U.S. 49, 59 (1948).

* * *

[*Miranda's Protection of the Poor, Unintelligent, or Uneducated Suspect*]

It is an undeniable fact that a very high proportion of criminal offenders are from the ranks of the poor, the uneducated, or the unintelligent. Many of them are entitled to compassion and to whatever rehabilitation society has to offer. The time to display that compassion, however, is *after* a determination has been made as to whether the suspect with such an unfortunate background actually committed the criminal offense for which he is suspected. He is hardly a fit subject for rehabilitation if his unlawful conduct is undetected, or if he has been unwilling to admit committing such

conduct. He or she is hardly amenable to rehabilitation as long as there is a denial of the wrongdoing; and *Miranda* is a roadblock to admissions.

A criminal offender who has "beaten the rap" because of the benefit bestowed upon him by *Miranda* is bound to have a lessened respect, or even contempt, for the legal system that permits such an escape chute. This, too, we suggest has a psychological disadvantage with respect to attempts at rehabilitation.

One further point with regard to the underlying social philosophy of *Miranda*: a very high percentage of the *victims* of crime are from the ranks of the poor, the uneducated, or the unintelligent. It is of no comfort to them to be told by the police investigators that they had been handicapped in their efforts because of court rulings requiring warnings to arrested suspects of their rights to silence and to a lawyer—warnings that are required so as to equalize humanity; in other words, to even things out as regards the poor and the rich, the uneducated and the educated, the unintelligent and the intelligent. This is not likely to produce tears in the eyes of victims who have been raped or robbed, or whose home has been burglarized while they were away at work earning a living. Such a reaction is also not to be expected when the victims are subsequently told that their offenders had been brought to trial but were acquitted, or had their convictions reversed, because they were either not warned of those rights or that the rights were not properly administered.

CONCLUSION

In addition to the *Miranda* confusion and the misconceptions within the courts, those of us who must instruct the police on the law governing interrogations and confessions encounter unsurmountable difficulty in satisfactorily explaining what the "bright line" is for such case situations as in *Arizona v. Roberson, supra, McNeil v. Wisconsin,* __ U.S. _, 111 S.Ct. 2204 (1991), *Patterson v. Illinois,* 487 U.S. 285 (1988), and *Minnick v. Mississippi,* __ U.S. __, 111 S.Ct. 486 (1990). To the police the line is a very fuzzy one, and the frustration they experience could result in a shrug of the shoulders and a disrespect for the courts that sit in judgment over their conduct.

As a means for avoiding, or at least considerably diminishing, the confusion that presently exists within both the courts and the law enforcement community with regard to *Miranda's* mandates, we respectively urge the court to consider the following proposal:

***Miranda* should be modified in a way that would indeed provide a truly bright line for guidance. That modification should require that *all* suspects, whether in custody or not, be told "You have a right to remain silent." Period!**

If the suspect refuses to talk or states that he wants a lawyer, the interrogation must cease, unless the suspect subsequently indicates a willingness to talk about the matter under investigation. If he does, and the warning is again issued of his self-incrimination privilege, there may be questioning about the present offense, as well as any *unrelated* offense. Even if the suspect does not initiate such a willingness, the police may attempt to question him about *unrelated* offenses, preceded, of course, by the self-incrimination warning.

This suggested modification of the presently existing requirement would be readily understandable to the police, and it would render more effective their investigative efforts to solve serious crimes. It would also serve *Miranda's* basically intended purpose of letting the suspect know that he has a constitutional privilege not to incriminate himself. With such a modified requirement the police and the courts can "get along."

We respectfully urge the Court to give consideration to our proposal.

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BRIEF OF THE DISTRICT OF COLUMBIA, *AMICUS CURIAE*, IN SUPPORT OF REVERSAL

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INTEREST OF THE DISTRICT OF COLUMBIA, *AMICUS CURIAE*

The District of Columbia appears as *amicus curiae* because the criminal offenses with which respondent is charged are violations of District of Columbia law and because the investigative procedures at issue are those that were used by District of Columbia police, members of the Metropolitan Police Department. Despite the District's close involvement in investigation of the murder of which respondent is accused, it is not a party to this litigation because the Congress has not delegated to it the authority to prosecute felonies or serious misdemeanors that violate District law. Authority for such prosecutions remains in the United States rather than in the people of the District of Columbia.

The interest of the District of Columbia is in the effective investigation and resolution of serious crimes committed by repeat offenders and in establishing that police investigators may initiate custodial questioning of an accused about a new crime as

long as they adequately warn him of his right to remain silent and to request counsel, and the accused waives those rights, aware that his decision not to discuss the earlier crime without counsel had been fully honored. The decision below hampers criminal investigations of serious crimes, committed by repeat offenders. It does so without benefit to the accused even after he is informed of the right to counsel and the right to choose between speech and silence.

STATEMENT OF THE CASE

On July 18, 1989, District of Columbia Metropolitan Police Department officers arrested respondent on drug charges. The officers gave him a printed advice-of-rights form. In response to the printed question whether he was willing to talk to the police without having an attorney present, respondent wrote "No." The officers did not attempt to question him. (App. 2a).

Respondent appeared in court the following day, and an attorney was appointed to represent him. On July 28, 1989, the drug charges were dismissed at the preliminary hearing but respondent remained in custody on an unrelated juvenile matter. (App. 2a).

In August 1989, a grand jury indicted respondent on charges of possessing a controlled substance with intent to distribute it, the offense for which he had been arrested in July. On September 27, 1989, after consultation with the lawyer appointed for him on July 19, respondent entered a plea of guilty to the lesser included offense of attempted possession of a controlled substance with intent to distribute it. (App. 2a).

On January 4, 1990, while respondent remained in custody, without bond and awaiting sentencing on the drug charge, a Metropolitan Police Department detective obtained an arrest warrant charging respondent with the 1988 murder of Cheaver Herriott, a crime unrelated to the drug charge. The next day, officers brought respondent to the police department's homicide office for booking. The officers advised respondent of his right

to obtain counsel and to remain silent, and he agreed to waive those rights. Respondent discussed his involvement in the murder of Herriott with the officers, and they again advised him of his rights. Respondent then made a videotaped statement in which he confessed to his involvement in the robbery and murder. (App. 3a).[1]

Respondent was indicted for murder. He moved to suppress his confession, claiming that it had been obtained in violation of *Edwards v. Arizona*, 451 U.S. 477 (1981). The trial court ordered that respondent's confession be suppressed. (App. 31a–33a.)[2]

The District of Columbia Court of Appeals affirmed based principally on *Edwards v. Arizona*, 451 U.S. 477 (1981), and *Arizona v. Roberson*, 486 U.S. 675 (1988). The Court of Appeals ruled that once respondent had invoked his right to counsel on the drug charge, he could not waive that right in subsequent police-initiated interrogation on the unrelated murder charge.

SUMMARY OF THE ARGUMENT

The prophylactic rules that have been created to safeguard those in *Miranda v. Arizona*, 384 U.S. 436 (1986), provide insufficient guidance concerning whether the police may initiate questioning of a suspect in custody on an unrelated offense when he has invoked his right to counsel in questioning on the offense for which he is being held. The Court should adopt the following bright line to guide police-initiated questioning of suspects who have invoked their right to counsel in questioning concerning the offense for which they are being held. If the request for counsel has been honored concerning the charged offense, police may administer fresh *Miranda* warnings and may initiate ques-

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[1] About seven weeks later, on February 26, 1990, respondent was sentenced to 15 months' incarceration under the Youth Rehabilitation Act for the drug possession charge. (App. 2a).

[2] The trial court rejected respondent's contentions that his confession was involuntary, and that it was obtained during an unnecessary delay in bringing him to court. (App., 20a–22a, 26a–28a).

tioning concerning an unrelated offense if the questioning is sufficiently separated in time from previous questioning on the charged offense to indicate to the suspect that it indeed concerns an offense different from the one for which he requested counsel. The validity of a waiver of rights during questioning would be determined on the totality of the circumstances.

This test protects exercise of the Fifth Amendment privilege and is fully consistent with *Miranda*. It removes from *Miranda's* prophylactic rules the presumptions that a suspect is unwilling to answer police questions concerning one offense solely because he refused to answer questions concerning an unrelated offense; that he wishes to have counsel in questioning on one offense solely because he requested counsel in questioning on an unrelated offense; and having once invoked his right to counsel in questioning on one offense, his free will would be overborne by that experience when administered *Miranda* warnings in questioning on an unrelated offense. These presumptions have no basis in fact or logic and should not form the basis for *Miranda* prophylactic rules.

A bright line could also be drawn when respondent plead guilty to the drug offense. That plea operated as a waiver of his Fifth Amendment privilege. Since the sole purpose of the prophylactic rules is to protect exercise of the privilege, the rules' protections concerning the drug offense should have ended when respondent's plea was accepted by the court.

ARGUMENT

WHEN A POLICE-INITIATED CUSTODIAL INTERROGATION RELATES TO A DIFFERENT OFFENSE FROM THE ONE CONCERNING WHICH THE SUSPECT PREVIOUSLY REQUESTED COUNSEL, AND THE INTERROGATION IS SUFFICIENTLY SEPARATED IN TIME TO UNDERSCORE TO THE SUSPECT THAT IT INDEED CONCERNS AN OFFENSE DIFFERENT FROM THE ONE FOR WHICH HE REQUESTED COUNSEL, THE INTERROGATION DOES NOT VIOLATE THE FIFTH AMENDMENT IF THE SUSPECT IS AGAIN PROVIDED *Miranda* WARNINGS AND HIS PREVIOUS REQUEST FOR COUNSEL WAS HONORED; THIS IS ESPECIALLY TRUE WHEN THE SUSPECT HAS PLEAD OR BEEN ADJUDICATED GUILTY OF THE FIRST OFFENSE.

No constitutional interest or right is served by the court of appeals' decision, which suppresses a confession that was not obtained in violation of Fifth Amendment rights, and which curtails effective law enforcement by preventing police officers from questioning repeat offenders concerning suspected crimes simply because they are in custody on unrelated offenses for which counsel has been requested.

The court of appeals misconstrued this Court's decisions to hold that, where a suspect asks for the assistance of counsel in dealing with custodial interrogation that immediately follows an arrest, the suspect cannot thereafter waive his right to counsel in any police-initiated interrogation as long as he is held in continuous custody. The court of appeals held that waiver is impossible no matter how long the custody continues, no matter what the disposition of the initial charges on which the suspect was arrested, no matter how unrelated the subsequent questioning is to the initial charges, and no matter how remote in time and circumstances the subsequent questioning is from that which occurred at the initial arrest. Here, suppression was ordered even though counsel had been appointed for respondent following the initial request and the prosecution of the drug charge had run its course, ending in a plea of guilty, three months before the interrogation and resulting confession to murder.

Neither the protection embodied in the Fifth Amendment privilege against self-incrimination nor this Court's precedents shaping the contours of that protection justify discarding a knowing, intelligent, and uncoerced statement, given after administering *Miranda* warnings before questioning on the new offense. Certainly, where the suspect has confessed to the offense for which

counsel was requested, or the prosecution of that offense has run its course with a plea or finding of guilty, there is no justification for making his initial request for counsel applicable to questioning on unrelated offenses.

A.

In *Miranda u. Arizona*, 384 U.S. 436, 460–461 (1966), the Court made the Fifth Amendment privilege against compelled self-incrimination applicable to custodial interrogation by the police.[3] The Court required that police administer the now familiar warnings, which are not themselves required by the Constitution but are deemed necessary to protect exercise of the privilege in the inherently coercive atmosphere of custodial interrogation in a police dominated setting. *Id.* at 467. The Court held that prior to any custodial interrogation, a suspect must be advised that "he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed." *Id.* at 444, 467–473.

The "fundamental purpose" of these prophylactic rules is "to assure that *the individual's right to choose* between speech and silence remains unfettered throughout the [custodial] interrogation process." *Connecticut u. Barrett*, 479 U.S. 523, 528 (1987), *quoting Miranda, supra*, 384 U.S. at 469; emphasis in *Barrett*.[4]

[3]Prior to *Miranda*, the admissibility of an accused's statements while in custody was judged solely on whether they were "voluntary" within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment. *Oregon u. Elstad*, 470 U.S. 298, 304 (1985).

[4]In keeping with the fundamental purpose of unfettered choice, the Court has made clear that the Fifth Amendment privilege against compulsory self-incrimination and the related right to have counsel present during custodial interrogation are not self-executing. *Moran u. Burbine*, 475 U.S. 412, 433 n. 4 (1986). (*Miranda* did not create a right to the presence of an attorney "that is triggered automatically by the initiation of the interrogation itself"). Instead, the basic requirement is that the accused must " actually invoke[ ] his right to counsel" by "stat[ing] that he wants an attorney." *Smith u. Illinois*, 469 U.S. 91, 95 & n. 2 (1984); *Michigan u. Mosley*, 423 U.S. 96, 104 n. 10 (1975).

A suspect must make "an initial election as to whether he will face the State's officers during questioning with the aid of counsel, or go it alone." *Patterson u. Illinois*, 487 U.S. 285, 291 (1988). If the suspect " 'knowingly and intelligently' pursues the latter course," there is "no reason why the uncounseled statements he then makes must be excluded at his trial." *Id.*

In subsequent cases, the Court adopted additional prophylactic rules that elaborate on the *Miranda* rules. In *Edwards u. Arizona*, 451 U.S. 477 (1981), the Court held that once a suspect invokes his right to counsel, he "is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police." *Id.* at 484–485. In *Arizona u. Roberson*, 486 U.S. 675 (1988), the Court extended the principle of *Edwards* to interrogations conducted in the course of separate investigations, holding that a suspect's request for counsel bars subsequent police-initiated custodial interrogation of a suspect on any subject. *Id.* at 683–685.[5] And in *Minnick u. Mississippi*, 111 S. Ct. 486 (1990), the Court concluded that permitting a suspect who has requested counsel merely to consult with his attorney before the police conduct further interrogation does not satisfy the *Edwards* rule. The Court held that "when counsel is requested, interrogation must cease, and officials may not reinitiate interrogation without counsel present, whether or not the accused has consulted with his attorney." *Id.* at 491.

[5]The Court explained this holding by saying that the Fifth Amendment right against self-incrimination is not offense specific. *Arizona v. Roberson, supra*, 486 U.S. at 685; *McNeil v. Wisconsin*, 111 S. Ct. 2204, 2208 (1991). But certainly that does not mean that the right cannot, and does not, operate independently when unrelated offenses are involved. Respondent would not lose his Fifth Amendment right regarding either the murder or the drug offense by a guilty plea or a confession to one of the offenses but not to the other. Similarly, respondent could choose to waive *Miranda* rights as to one, but not the other, of these unrelated offenses.

The purpose of the *Edwards* right to counsel rule is to protect an accused in police custody from being "badgered" by police officers in the manner in which Edwards was. *Oregon v. Bradshaw*, 462 U.S. 1039, 1044 (1983) (plurality opinion); *Michigan v. Harvey*, 494 U.S. 344, 350 (1990). The *Edwards* right to counsel may be waived when the accused initiates a dialogue with the police and a knowing and intelligent waiver can be found from the totality of the circumstances. *Edwards*, 451 U.S. at 485–86 & n. 9; *Wyrick v. Fields*, 459 U.S. 42, 46–57 (1982) *(per curiam)*; *Oregon v. Bradshaw*, 462 U.S. 1039 (1983).

Although there is language in *Edwards*, in *Roberson*, and in *Minnick* (language quoted above), which arguably supports the court of appeals' decision here, it was serious error to extract from those decisions the extraordinarily broad principle that by requesting counsel in the questioning that immediately follows arrest, a suspect, during a continuous period of custody, cannot knowingly waive his right to counsel in police-initiated questioning concerning unrelated offenses. Each of these cases dealt with pre-arraignment questioning and requests for counsel that followed within days of the arrest. In *Edwards*, only one day had elapsed between the suspect's invocation of the right to counsel and reinitiation of the interrogation. 451 U.S. at 478–479. In both *Minnick* and *Roberson*, the period had been three days. 111 S. Ct. at 188–499; 486 U.S. at 687. *Edwards* and *Minnick* dealt with resumption of questioning on the same offense. And in *Roberson*, questioning concerning the unrelated offense apparently occurred on the same day or days the suspect was being questioned, in disregard to his request for counsel, on the charge for which he was arrested.

The court of appeals' ruling is also inconsistent with the purpose of the *Miranda* warnings, which is "to assure that the individual's right to choose between speech and silence remains unfettered." *Miranda, supra*, 384 U.S. at 469; *Connecticut v. Barrett, supra*, 479 U.S. at 528; *see also, Patterson v. Illinois, supra*, 487 U.S. at 291 (suspect must make "initial election"). The Court

would remove this element of choice if it were to presume (as the court of appeals ruled it has) that a request for counsel immediately following arrest forecloses any police-initiated interrogation during the suspect's continuous custody, no matter how remote in time or subject from that at the initial arrest. Such a doctrinaire approach is inconsistent with the dual principles of requiring a suspect to choose between speech and silence and of "knowing and intelligent waiver" that undergird the promulgation of the *Miranda* warnings. *Miranda, supra*, 384 U.S. at 375–376; *Johnson v. Zerbst*, 304 U.S. 458 (1938).

B.

There is no logical basis to presume that when a suspect invokes his right to counsel during custodial questioning relating to one offense, he in fact intends to invoke it also for different custodial interrogation on a separate offense. In fact, a suspect might be quite willing to respond to questioning relating to one offense but may wish to remain silent or have counsel relating to a separate one. There is also no logical basis for presuming that where a suspect invokes his right to counsel in questioning on one offense, the experience of having done so will overbear his free will and make him incapable of requesting counsel during separate interrogation on an unrelated offense. In fact, common experience indicates precisely the opposite. If he asked for counsel once following *Miranda* warnings and counsel was furnished, he is perfectly capable of also making a choice as to his need for counsel in separate questioning on an unrelated offense, assuming he is properly warned.

These presumptions, which are contrary to fact and to logic, will be built into the edifice of prophylactic *Miranda* rights if the judgment in this case is affirmed. The incremental benefit of doing so to the protection of constitutional rights is minimal, since *Miranda* warnings give all the protection that a suspect needs in order to invoke his Fifth Amendment privilege. However, the cost to effective law enforcement would be great, be-

cause it will mean that repeat offenders who have invoked their right to counsel on one offense will be unapproachable by police on any other offense during continued custody.

Clearly, a test can be devised which meets the legitimate needs of law enforcement and fully protects the rights of suspects. The test we propose and which we believe is most fully consistent with *Miranda* is as follows: When the police-initiated custodial interrogation relates to a different offense from the one concerning which the suspect previously requested counsel, and the interrogation is sufficiently separated in time to underscore to the suspect that it indeed concerns an offense different from the one for which he requested counsel, the interrogation does not violate *Edwards* if the request for counsel for the first crime was honored, and if the police again administer *Miranda* warnings.[6] In these circumstances, the administration of *Miranda* warnings fully protects the suspect. *Cf. Oregon v. Elstad, supra,* 470 U.S. at 317–18. These warnings are the same warnings he was given concerning the first offense, and the efficacy of which he became aware when counsel was provided.

The bright line that we propose is quite close to the *Edwards* rule, as it was refined in the subsequent decisions in *Oregon v. Bradshaw, supra,* and in *Wyrick v. Fields, supra. Edwards* dealt with resumption of uncounseled questioning for the offense concerning which the suspect invoked his right to counsel. In *Bradshaw* the plurality ruled that the suspect initiated conversation under *Edwards* by "evinc[ing] a willingness and a desire for a generalized discussion about the investigation," when he asked "[w]ell what is going to happen to me now." 462 U.S. at 1042, 1045–1046. The question then was whether, under the totality of the circumstances that included fresh *Miranda* warnings, there was a knowing and intelligent waiver of *Miranda* rights. *Id.* at

[6]In *Arizona v. Roberson, supra,* police did not honor the request for counsel relating to the first offense and they did not discontinue questioning when counsel was requested. Questioning concerning the second or unrelated offense was initiated on the same day that police interrogated the suspect concerning the first offense. *See id.* at 686 and nn. 6 & 7.

1045–1046. The concurring opinion would have decided the case solely under the second step of the analysis. *Id.* at 1051 (Powell, J., concurring in the judgment) ("Courts should engage in more substantive inquiries than 'who said what first.' ").

The bright line we propose relates to questioning on unrelated offenses. The requirement that such questioning be sufficiently separate in time from the previous questioning so as to underscore to the suspect that it concerns a different offense offers at least as much protection to the suspect as the first step of the two-step *Edwards/Bradshaw* test, where the request for counsel for the first offense was met. Moreover, any questioning on the unrelated offense would follow fresh *Miranda* warnings, and the validity of a waiver of those rights would be determined on the totality of the circumstances. *Edwards, supra,* 451 U.S. at 486, n. 9; *Wyrick v. Fields, supra,* 459 U.S. at 47.

C.

If, however, the court of appeals had been correct in ruling that *Edwards* precludes police-initiated interrogation that is as remote in time and subject matter as occurred here, the confession still should not have been suppressed. Respondent's invocation of his *Edwards* right to have counsel present during custodial interrogation had no continuing effect after his plea of guilty to the drug charge—the charge on which he had invoked the right. The plea of guilty was "an admission to all of the elements" of the offense and "simultaneously waiv[ed] several constitutional rights, including *his privilege against compulsory self incrimination,* his right to trial by jury, and his right to confront his accusers." *McCarthy v. United States,* 394 U.S. 459, 466 (1969) (emphasis added; footnote omitted). Such a plea "is more than a confession which admits that the accused did various acts; it is itself a conviction; nothing remains but to give judgment and determine punishment." *Boykin v. Alabama,* 395 U.S. 238, 242 (1969). The guilty plea is "a break in the chain of events which has preceded it in the criminal process" and precludes the defendant even from "rais[ing] independent claims relating to the de-

privation of constitutional rights that occurred prior to" the plea. *Tollett v. Henderson*, 411 U.S. 258, 267 (1973).[7]

When respondent waived his Fifth Amendment privilege by his plea of guilty to the drug charge his rights to counsel under *Edwards* necessarily evaporated. The fundamental purpose of the prophylactic rule of *Edwards*, like all such rules under *Miranda*, is to protect the accused's exercise of his privilege against compulsory self-incrimination. *New York v. Quarles*, 467 U.S. 649, 654 (1984). In ruling otherwise, the court of appeals relied on a presumed *Edwards* right "to communicate with the police only through counsel" throughout his custody. (App. 14a). *Edwards* established no such independent right; its only function is to protect the Fifth Amendment privilege. And that privilege was waived when respondent elected to plead guilty.[8]

This necessarily meant that three and one-half months later, when confronted with the murder charge, respondent had the "initial election" to request counsel during questioning or to "go it alone." *Patterson v. Illinois, supra*, 487 U.S. at 291. And his confession to murder, following *Miranda* warnings was not in violation of his constitutional rights or of any rights provided by the prophylactic rules.

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[7]The Superior Court Criminal Rules, which are nearly identical to the Federal Rules of Criminal procedure, require that the court inform the defendant that his guilty plea is also a waiver of his privilege against self-incrimination. It is mandatory that a defendant be informed prior to his plea that he has a Fifth Amendment right against compelled self-incrimination. D.C. Super. Ct. Crim. Rule 11(c)(3). A defendant must also be informed that he may be questioned by the court about his involvement in the offense to which he is pleading guilty, and that his answers can in certain circumstances be used against him in subsequent criminal proceedings. D.C. Super. Ct. Crim. Rules 11 (c)(5), 11(e)(4).

[8]Although respondent asserts that a guilty plea should not be regarded as sufficient to allow waiver of the right to counsel in police-initiated questioning on an unrelated offense following fresh *Miranda* warnings, he acknowledges that waiver become constitutionally acceptable after sentencing on the first offense. (Br. in opp. at 13-14). Until sentencing, respondent argues, a suspect can ask to withdraw his plea. A guilty plea, however, is a public admission of every element of an offense and of the facts which undergird each element. There is no assurance that the plea, especially when entered with advice of counsel, will be allowed to be withdrawn. Even if withdrawal is permitted, once a suspect has publicly waived his right against self-incrimination in the criminal prosecution for which he requested counsel, there is no doctrinal reason why he should be precluded from making a similar waiver with respect to an unrelated offense if given a fresh opportunity to request counsel or to remain silent. In any event, if existence of the option of requesting withdrawal of a guilty plea has the significance respondent urges, the *Edwards* rule certainly should not survive sentencing.

CONCLUSION

The order suppressing the confession should be vacated.

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No. 91-1521

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1992

UNITED STATES OF AMERICA, Petitioner,

v.

LOWELL GREEN

On Writ of Certiorari to the
District of Columbia Court of Appeals

BRIEF FOR THE PUBLIC DEFENDER SERVICE FOR THE DISTRICT OF COLUMBIA AND THE NATIONAL LEGAL AID AND DEFENDER ASSOCIATION AS AMICI CURIAE SUPPORTING AFFIRMANCE

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No. 91-1521

In The

SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA, Petitioner,

v.

LOWELL GREEN

On Writ of Certiorari to the
District of Columbia Court of Appeals

BRIEF FOR THE PUBLIC DEFENDER SERVICE FOR THE DISTRICT OF COLUMBIA AND THE NATIONAL LEGAL AID AND DEFENDER ASSOCIATION AS AMICI CURIAE SUPPORTING AFFIRMANCE

INTERESTS OF AMICI

The Public Defender Service for the District of Columbia (PDS) is an independent agency established by Congress to provide legal assistance to

indigent persons charged with criminal offenses in the local and federal courts of the District of Columbia. D.C. Code §§ 1-2701, et seq. PDS therefore has an interest in protecting the exercise of the right to counsel recognized in Edwards v. Arizona, 451 U.S. 477 (1981). PDS participated as amicus curiae in the proceedings below.

The National Legal Aid and Defender Association (NLADA) is a private, non-profit national membership organization based in Washington, D.C. Its purpose is to assure the availability of quality legal services in criminal and civil cases to all persons unable to retain counsel. The membership of the NLADA includes most public defender offices around the country, as well as many assigned counsel and private

practitioners. Accordingly, the NLADA has a substantial interest in the preservation of the role of counsel in our adversary system of criminal justice.[1]

SUMMARY OF THE ARGUMENT

Petitioner's brief draws several factual distinctions between this case and Edwards v. Arizona, 451 U.S. 477 (1981), but it never offers a convincing, workable, and coherent rationale for the exception it seeks to the Edwards "bright line" rule. To paraphrase the court below, Pet. App. 15a, there is no "Leitfaden" leading through this Court's decisions to the result petitioner advocates.

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[1] The parties have consented to submission of this Brief. Rule 37.3.

In Edwards, this Court held "an accused, ... having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police." 451 U.S. at 485. The rule is clear and concise. Twice this Court has rejected arguments that it should restrict the Edwards holding based upon factual distinctions like those pressed by the government here. Arizona v. Roberson, 486 U.S. 675 (1988)(reinterrogation concerned a different case); Minnick v. Mississippi, 111 S.Ct. 486 (1990) (defendant had an opportunity to consult with counsel before reinterrogation). "The merit of

the Edwards decision lies in the clarity of its command and the certainty of its application. . . . 'This gain in specificity, which benefits the accused and the state alike, has been thought to outweigh the burdens [Edwards] imposes on law enforcement agencies and courts by requiring the suppression of trustworthy and highly probative evidence even though the confession might be voluntary under traditional Fifth Amendment analysis.'" Minnick, 111 S.Ct. at 490 (quoting Fare v. Michael C., 442 U.S. 707, 718 (1979)).

Petitioner principally relies upon Lowell Green's guilty plea as a "break in the chain of events" from the assertion of his right to counsel to his interrogation in January 1990. Pet. Br. 15 (quoting Tollett v. Henderson, 411 U.S. 258, 267 (1973)). A guilty plea,

however, does not have significance for the analysis in Edwards. It is neither a waiver of the right protected by Edwards nor the functional equivalent of "initiation" by the accused.

Despite his guilty plea, Green retained the right to refuse to answer questions about the drug case to which he pled guilty, or any other subject which might tend to incriminate him. A defendant who pleads guilty to an offense does not agree by so doing to submit to custodial interrogation about that offense without the assistance of counsel. A fortiori, a guilty plea does not waive a previously asserted right to have counsel present during questioning about unrelated matters.

A guilty plea also does not "reopen[] the dialogue with the

authorities," Edwards, 451 U.S. at 486 n.9. It is not evidence that an accused who has previously expressed the need for help in withstanding the pressures of custodial interrogation no longer desires the advice of counsel. For these reasons, the entry of a guilty plea has no effect on the Edwards rule.

In addition to proposing a categorical exception to Edwards for interrogations after guilty pleas, petitioner recites several factual circumstances which, it contends, would make application of the Edwards rule here inconsistent with its purpose. Pet Br. 7, 10, 25. The accumulation of these facts does not change the result dictated by Edwards. Every "bright line" rule applies to a range of circumstances. Miranda v. Arizona, 384 U.S. 436 (1966),

requires warnings even if the arrestee is a police officer, a lawyer, or a judge. Edwards cannot survive as a lucid and intelligible rule for the police if courts are invited, as they would be in every case, to make ad hoc policy judgments about whether to follow Edwards. See Pet. Br. 13, 25. Minnick, 111 S.Ct. at 492, Roberson, 486 U.S. at 681-82.

Moreover, Green had been charged with murder by complaint at the time the police interrogated him. As a result, the government had already moved from the investigatory phase - where the police seek information from a suspect which may inform a charging decision - to the prosecutorial phase - where interrogation is used to build the government's case against the defendant. Once "the adverse

positions of government and defendant have solidified," United States v. Gouveia, 467 U.S. 180, 189 (1984), as they had in this case, the dangers of undue coercion during interrogation increase, adding to the need for strict adherence to Edwards.

ARGUMENT

EDWARDS v. ARIZONA REQUIRES SUPPRESSION OF GREEN'S STATEMENT.

A. The Court Has Committed Itself to a "Clear and Unequivocal" Rule.

In Edwards, this Court unanimously agreed that Edwards' confession should be suppressed. The majority articulated a straightforward bright-line, prophylactic rule. Like the requirement for Miranda warnings, this rule "has the virtue of informing police and prosecutors with specificity as to what they may do in conducting custodial interrogation, and of informing courts under what circumstances statements obtained during such interrogations are not admissible." Minnick v. Mississippi, 111 S.Ct. at 490 (quoting Fare v. Michael C., 442 U.S. 707, 718 (1979)). "The merit of the Edwards decision lies in the clarity of

its command and the certainty of its application." Ibid. The Court "has repeatedly emphasized the virtues of a bright-line rule." Michigan v. Jackson, 475 U.S. 625, 634 (1986); Smith v. Illinois, 469 U.S. 91, 98 (1984); Solem v. Stumes, 465 U.S. 638, 646 (1984).

A "clear and unequivocal" rule, Minnick, 111 S.Ct. at 492, is desirable for at least three reasons. First, it makes clear to the police how to respond to invocations of the right to counsel. Since the rule is designed to prevent "badgering," Michigan v. Harvey, 110 S.Ct. 1176, 1180 (1990), it is important to leave little room for interpretation or evasion in the stationhouse. Second, an unequivocal rule is easier for trial courts to apply. Rather than a "presumption" which may be challenged by

the unique facts of any case, the Edwards rule is a standard of conduct which is relatively easy for a trial court to enforce. Third, on the appellate level, a bright-line rule achieves greater consistency than an approach based upon a "totality of the circumstances."

Petitioner seeks an exemption from the bright-line Edwards rule for this case, but never makes clear how broad or narrow that exemption would be. This approach substitutes an ad hoc "totality of the circumstances" test for the Edwards rule. To the extent petitioner's real quarrel is with Edwards and, more generally, with prophylactic rules to protect constitutional rights, it has made these arguments before, and they

should be rejected again.[2]

B. Lowell Green's Guilty Plea Did Not Constitute a Waiver of His Privilege Against Self-Incrimination and Was Not the Functional Equivalent of Initiation.

On July 18, 1989, Lowell Green, then eighteen years of age, was given a Metropolitan Police Department advice of rights form. He answered "yes" to three questions: "Have you read or had read to you the warning as to your rights;" "Do you understand these rights;" and "Do you wish to answer any questions." His answer to the fourth question, "Are you willing to answer questions without having an attorney present," was "no." This answer "expressed his desire to deal with the police only through counsel," Edwards, 451 U.S. at 485, and "expressed his own view that he [was] not competent

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[2] Petitioner participated as amicus in both Roberson and Minnick.

to deal with the authorities without legal advice." Arizona v. Roberson, 486 U.S. at 681 (quoting Michigan v. Mosley, 423 U.S. 96, 110 n.2 (1975) (White, J., concurring in result)). See Smith v. United States, 529 A.2d 312, 314 n.2 (D.C. 1987).

Nothing in the record suggests that Lowell Green limited his assertion of his right to counsel in any way. Nothing in the record suggests that his reason for requesting the assistance of counsel was limited to the drug charge for which he had been arrested. Just as a waiver would have been construed to permit questioning about any subject -- including the murder of Cheaver Herriott -- his assertion of the right to counsel must be construed as a refusal to discuss any matters with the police except in the

presence of counsel. Arizona v. Roberson, 486 U.S. at 684. As the Court said in Roberson, "there is no reason to assume that a suspect's state of mind is in any way investigation-specific." 486 U.S. at 684. Indeed, Green's initial refusal to speak to the police without a lawyer may have been prompted by his fear of blurting out information about a murder rather than reluctance to discuss the drug offense for which he was arrested. This Court's decision in Edwards requires the suppression of statements Mr. Green made during custodial interrogation without the benefit of counsel whose assistance he had requested during the course of questioning he had not initiated. Edwards, 451 U.S. at 485.

1. A guilty plea is not a "waiver" of the right to the aid of counsel during questioning.

Petitioner contends that Green's guilty plea in the drug case makes Edwards inapplicable to the murder case. Pet. Br. 15-17. .This argument mischaracterizes the legal and factual implications of a guilty plea and ignores the significance of the Court's decision in Roberson.

This Court said in Tollett v. Henderson, 411 U.S. 258 (1973), that a guilty plea extinguishes a defendant's right to raise constitutional claims which might have been available if the defendant had gone to trial.[3] This means

[3] This is the sense in which waiver is used in Boykin v. Alabama, 395 U.S. 238, 243 (1969). A defendant who pleads guilty also expressly waives certain rights under Fed. R. Cr. P. 11, or its Superior Court counterpart. McCarthy v. United States, 394 U.S. 459, 466 (1969). This express waiver does not include the right at issue here.

that by pleading guilty a defendant loses the opportunity to challenge most pre-existing constitutional errors. This does not mean, however, that a defendant, by pleading guilty, has surrendered protection against future violations of his or her constitutional rights. See Minnesota v. Murphy, 465 U.S. 420, 426 (1984) (even conviction does not preclude assertion of Fifth Amendment privilege).

Unless a plea agreement expressly provides for cooperation with the government, a guilty plea is not a "waiver" of the right to have counsel present during custodial interrogation. Generally, a guilty plea is not even a waiver of the right not to incriminate oneself. Superior Court Rule 11(c), which is substantively identical to Fed. R. Cr. P. 11(c), requires the court to

advise the defendant "[t]hat he has the right to plead not guilty or to persist in that plea if it has already been made, and that he has the right to be tried by a jury and at that trial has the right to the assistance of counsel, the right to confront and cross-examine witnesses against him, and the right not to be compelled to incriminate himself" (emphasis added). As a general matter, defendants who enter guilty pleas give up their right to assert the privilege at trial because "there will be no trial." See 1 FEDERAL JUDICIAL CENTER, BENCH BOOK FOR UNITED STATES DISTRICT JUDGES 1.06-8-9 (3d ed. 1986); Sup. Ct. Cr. R. 11(c)(4). A plea is treated as a substitute for a trial and as a waiver of any rights which would be exercised during trial. A guilty plea therefore has no greater

effect on a defendant's Fifth Amendment privilege than a guilty verdict.[4]

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[4] In general, "[a] convicted but unsentenced defendant retains his Fifth Amendment rights." United States v. Lugg, 892 F.2d 101, 102 (D.C. Cir. 1989)(witnesses who had entered guilty pleas retained privilege not to testify about offense of conviction); United States v. Houghton, 554 F.2d 1219, 1222 (1st Cir. 1977), cert. denied, 434 U.S. 851 (1977) (acceptance of guilty plea would not constitute a waiver of Fifth Amendment privilege, privilege continued "at the very least" until sentencing); United States v. Trejo-Zambrano, 582 F.2d 460, 464 (9th Cir.), cert. denied, 439 U.S. 1005 (1978); United States v. Miller, 771 F.2d 1219, 1235 (9th Cir. 1985); Meehan v. State, 397 So.2d 1214, 1215 (Fla. App. 1981) (right against self incrimination continues after conviction until sentencing). But see Brown v. Butler, 811 F.2d 938, 940 (5th Cir. 1987) (rejecting claim that Miranda warnings were required before presentence interview because "[b]y pleading guilty, Brown waived the privilege against compulsory self-incrimination guaranteed by the fifth amendment").

In Estelle v. Smith, 451 U.S. 454 (1981), the Court held that the admission of psychiatric testimony in the penalty phase of a capital trial violated the defendant's Fifth and Sixth Amendment rights. The Court rejected the State's argument that incrimination ended with an adjudication of guilt. 451 U.S. at 462. The Court did not decide whether "the same Fifth Amendment concerns are necessarily presented by all types of interviews and examinations that might be ordered or relied upon to inform a sentencing determination." 451 U.S. at 469 n.13.

The courts have generally concluded that Miranda warnings are not required before routine presentence interviews by court probation officers. United States v. Cortes, 922 F.2d 123, 126 (2d Cir. 1990); Baumann v. United States, 692 F.2d 565, 576 (9th Cir. 1982); United States v. Jackson, 886 F.2d

A guilty verdict or a guilty plea does not extinguish a defendant's Fifth Amendment privilege even with respect to the offense of conviction. Pet. App. 13a. It follows that a finding of guilt of one offense does not deprive a defendant of the right to refuse to answer questions about other offenses.[5]

838, 842 n.4 (7th Cir. 1989); United States v. Rogers, 912 F.2d 975, 979 (10th Cir.), cert. denied, 111 S.Ct. 113 (1990); United States v. Davis, 919 F.2d 1181, 1186-87 (6th Cir. 1990); Limp v. State, 457 N.E.2d 189, 191 (Ind. 1983); People v. Bachman, 127 Ill. App. 3d 179, 82 Ill. Dec. 270, 468 N.E.2d 817, 822 (Ill. App. 1984); People v. Daniels, 149 Mich. App. 602, 386 N.W.2d 609, 613 (Mich. App. 1986). Most of these cases assume, however, that the Fifth Amendment privilege applies to these presentence interviews. There may be many aspects of an offense which could lead to an increased sentence, so that a defendant could not be compelled to give a full account of an offense, even after pleading guilty, without violating the Fifth Amendment.

[5] By pleading guilty, "a witness does not lose his Fifth Amendment right to refuse to testify concerning other matters or transactions not included in his conviction or plea agreement." United States v. Tindle, 808 F.2d 319, 325 (4th Cir. 1986), cert. denied, 490 U.S. 1114 (1989); accord United States v. Johnson, 488 F.2d 1206, 1209-10 (1st Cir. 1973); United States v. Ramos, 810 F.2d 308, 314 (1st Cir. 1987); United States v. Domenech, 476 F.2d 1229, 1231 (2d Cir.), cert. denied, 414 U.S. 840 (1973); United States v.

Defendants are not advised that, by pleading guilty, they give up any future right to refuse to answer questions about the offense of conviction,[6] much less

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Yurasovich, 580 F.2d 1212, 1218 (3d Cir. 1978); United States v. Lyons, 703 F.2d 815, 818 n.2 (5th Cir. 1983); United States v. Damiano, 579 F.2d 1001, 1002 (6th Cir. 1978); United States v. Moore, 682 F.2d 853, 856 (9th Cir. 1982).

[6] The court is required to advise the defendant that "[i]f the Court intends to question the defendant under oath, on the record, and in the presence of counsel about the offense to which he has pleaded, that his answers may later be used against him in a prosecution for perjury or false statement." Sup. Ct. Cr. R. Rule 11(c)(5)(emphasis added). However, unlike a statement made following a true waiver of a defendant's protection against self-incrimination, a defendant's acknowledgement of guilt during a plea proceeding is not admissible if the guilty plea is later withdrawn. Rule 11(e)(4)(C). The record does not show whether Green made any statement when he entered his guilty plea in the drug case.

Moreover, the general rule is that a waiver of the privilege in one proceeding -- such as a plea hearing -- does not preclude the assertion of the privilege in a subsequent proceeding. In re Neff, 206 F.2d 149, 152 (3d Cir. 1953); United States v. Smith, 940 F.2d 710, 713 (1st Cir. 1991); United States v. Miranti, 253 F.2d 135, 139 (2d Cir. 1958); United States v. Goodman, 289 F.2d 256, 259 (4th Cir.), vacated, 368 U.S. 14 (1961); United States v. Ballantyne, 237 F.2d 657, 665 (5th Cir. 1956); United States v. Licavoli, 604 F.2d 613, 623 (9th Cir. 1979), cert. denied, 446 U.S. 935 (1980). See also United States v. Miller, 904 F.2d 65, 69 (D.C. Cir. 1990) (recognizing that D.C. Circuit holds "minority view").

that they are surrendering the right to have counsel present during custodial interrogation by the police. Indeed, the mandatory advice to a guilty pleading defendant includes a continuing right to the assistance of counsel, Sup. Ct. Cr. R. 11(c)(2). It follows a fortiori that a guilty plea in one case has no effect whatsoever on the previously asserted right to have counsel present during questioning about different offense. Even if, as petitioner argues, a guilty plea amounted to a waiver, the scope of the waiver would be narrower than the original assertion of the right to counsel, which was not "investigation - specific." Arizona v. Roberson, 486 U.S. at 684. Petitioner's discussion of Green's guilty plea omits any reference to Roberson, obscuring the disparity

between the scope of the putative waiver and the scope of the assertion.

Nothing in this record shows that Lowell Green waived any rights at all. All the record shows is that he offered a guilty plea, which a Superior Court judge accepted. The government did not argue waiver based upon the guilty plea in the trial court, and did so for the first time on appeal. The most this Court should presume from this silent record is a limited waiver complying with Rule 11 which in no way implicates the Edwards right to counsel during custodial questioning.[7]

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[7] As the Court observed in McNeil v. Wisconsin, 111 S.Ct. 2204, 2209 (1991), the assertion of Sixth Amendment right to counsel is not an assertion of the Fifth Amendment right "as a matter of fact." Likewise, "as a matter of fact" the limited waiver of rights in the course of a guilty plea is not a waiver of the Edwards right.

2. A guilty plea does not imply a willingness to communicate directly with the police which is equivalent to initiation by the accused.

The Court said in Edwards that interrogation is permissible after a suspect requests counsel only if counsel is present or if the defendant initiates a conversation with the police about the offense. 451 U.S. at 485. When a suspect who has previously requested a lawyer "evince[s] a willingness and a desire for a generalized discussion about the investigation," Oregon v. Bradshaw, 462 U.S. 1039, 1045-46 (1983), the need for prophylactic measures against coercion is diminished. The reason for this is that by reopening a dialogue with the authorities, the subject of the interrogation repudiates a previously expressed "desire to deal with the police only through counsel." Edwards, 451 U.S.

at 485. Initiation cancels out a previous assertion of the Fifth Amendment right to counsel because it concerns precisely the same point: whether an accused is willing to talk to the police without a lawyer.

A guilty plea is not the functional equivalent of initiation. Petitioner acknowledges "that a guilty plea is not necessarily inconsistent with a continuing desire to deal with the government only through counsel," Pet. Br. 16, that is, a guilty plea is fully consistent with a continuing assertion of Edwards rights. It does not, as a factual matter, reflect any renewed willingness to brave the pressures of custodial interrogation. A defendant who has entered a guilty plea and is pending sentencing may be particularly vulnerable

to pressure to "cooperate" with the authorities by answering questions. See Roberts v. United States, 445 U.S. 552, 557-560 (1980)(sentence may be enhanced for failure to cooperate with the authorities; no showing in this case that the defendant's silence was "protected by the privilege against self-incrimination"). Nor does a guilty plea imply any agreement to forego the advice or presence of counsel. Green was represented by a lawyer during and after his guilty plea in the drug case.[8]

Because, as the government admits, a guilty plea does not signify a change of heart about a defendant's willingness to forego the help of a lawyer, approaching

[8] Because of Green's Sixth Amendment right to counsel, it clearly would have been impermissible for the police to question him for purposes of gathering information to enhance his sentence. Estelle v. Smith, 451 U.S. at 470-72.

a defendant after a guilty plea or a guilty verdict, see Pet. Br. 17, "and seek[ing] to determine if he would now like to speak with [the police] about an unrelated offense," Pet. Br. 18, presents exactly the same dangers of coercion as approaching a defendant about an unrelated offense before a guilty plea. Even after a guilty plea, "a later decision at the authorities' insistence to make a statement without counsel's presence may properly be viewed with skepticism." Roberson, 486 U.S. at 681 (quoting Michigan v. Mosley, 423 U.S. 96, 110 n.2 (1975)(White, J., concurring in the result)). This Court has already said in Roberson, that an assertion of the right to counsel forecloses custodial questioning, even about an unrelated offense. The government does not

challenge Roberson, and it controls this case.

The government eventually retreats to a "broader point: the irrebuttable presumption from Edwards should not apply when there is a significant change in the accused's status prior to the interrogation." Pet. Br. 17. But petitioner fails to justify creating an exception to Edwards because it cannot show that a guilty plea is a change of status inconsistent with the purposes of the Edwards rule.

C. The Other Distinguishing Factors Petitioner Cites Do Not Make Edwards Inapplicable to this Case.

Petitioner identifies three facts in addition to Green's guilty plea which it claims take this case out of the ambit of Edwards. But petitioner does not propose a "clear and unequivocal" rule of conduct

which accounts for these facts. Instead, petitioner's argument leads to an ad hoc approach which cannot be squared with Edwards, Minnick and Roberson. A bright-line rule must be justified by a purpose, but this does not mean that the rule should be re-examined each time it is applied. In any event, the rationale of Edwards applies even after consideration of all of the facts petitioner cites.

The length of time between Green's assertion of his right to counsel and the renewed interrogation does not offer a principled basis for a decision in this case.[9] Petitioner ignores the need for

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[9] This does not mean, however, that an assertion of the right to counsel would extend to offenses committed after the assertion, since a suspect would have no reason to expect to be questioned about criminal conduct which has not yet occurred. For this reason, there is no need to impose a time limit on Edwards in order to justify the result in United States v. Hall, 905 F.2d 959, 962 (6th Cir. 1990), cert. denied, 111 S.Ct. 2858 (1991) (threatening letter sent after Hall was appointed counsel in unrelated state matter). In

clarity in this area of the law. Its brief proposes no predictable standard to determine how long is too long. See Pet. Br. 20-22 (more than a "few days"). Moreover, an extended period of time in custody may increase, rather than diminish, the coercive pressures to comply with custodial interrogation. Minnick, 111 S.Ct. at 491. Prisoners are expected to answer the questions of those in authority, see Baxter v. Palmigiano, 425 U.S. 308, 318 (1976) (privilege

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any event, Hall is controlled by McNeil v. Wisconsin, 111 S.Ct. 2204 (1991), rather than Edwards.

State v. Newton, 682 P.2d 295, 298 (Utah 1984), the other case the government cites as support for a temporal limit on the assertion of the right to counsel, Pet. Br. 22 n.7, misinterpreted Edwards. The Newton court said "the rule established in Edwards is not a per se rule, but requires a consideration of the totality of the circumstances to determine if a defendant should have been re-advised of his rights prior to additional questioning." Newton, 632 P.2d at 297. Newton erroneously applied the "scrupulously honor" standard of Michigan v. Mosley, rather than requiring initiation under Edwards.

against self-incrimination does not apply to prison disciplinary proceedings), and become inured to the loss of privacy and dignity which attends incarceration. See Bell v. Wolfish, 441 U.S. 520 (1979); Block v. Rutherford, 468 U.S. 576, 589-91 (1984); Hudson v. Palmer, 468 U.S. 517, 528 (1984). For these reasons, a prisoner may be especially susceptible to coercion during custodial questioning.

The interrogation conducted in this case also placed pressure on Green beyond the normal consequences of incarceration. Unlike a prisoner questioned by a cellmate in his own familiar quarters, see Illinois v. Perkins, 110 S.Ct. 2394, 2397 (1990), Green was interrogated by detectives on the quintessentially coercive ground of the stationhouse. See Brief of the United States as Amicus

Curiae at 11, Illinois v. Perkins, (No. 88-1792). While incarcerated at the Youth Center, Green would have been notified of a "visit" by police officers, and would have had the right to refuse to see them, or to contact his attorney. In contrast, when he was transported to the Homicide Branch, he lacked even this degree of freedom. Like Minnick, Green was denied the choice whether to meet with his interlocutors. Minnick, 111 S.Ct. at 488.

The other factors petitioner highlights, interrogation about a different case and the fact that Green had counsel appointed for him in the drug case, are no more persuasive in combination than they were singly in Roberson and Minnick. There is even less reason to believe that consultation with

a lawyer appointed in a different case would be "effective in instructing the suspect of his rights," Minnick, 111 S.Ct. at 491, than there was in Minnick. Indeed, there is nothing in this record to suggest any consultation between Green and his counsel concerning the murder charge.

The fact that Lowell Green already had a lawyer before he was questioned cuts against petitioner. The right Green asserted was the right to have counsel present during questioning; he did not refuse to talk to the police as long as they gave him a lawyer. By questioning him without contacting the lawyer who already represented him, the police failed to honor his request. The implicit message was that talking to the police with the assistance of counsel was

not really an option.

D. Strict Adherence to Edwards is Required Once a Decision to Prosecute the Accused Has Been Made.

Edwards should be applied to this case because the interrogation here violated the central purpose of the rule. "Preserving the integrity of an accused's choice to communicate with the police only through counsel is the essence of Edwards and its progeny." Patterson, 487 U.S. at 291. "This Court has consistently emphasized and, more importantly, has stood fast to ensure the essential premise underlying our entire system of criminal justice that 'ours is an accusatorial and not an inquisitorial system - a system in which the State must establish guilt by evidence independently and freely secured and may not by coercion prove its charge against an

accused out of his own mouth.'" United States v. Mandujano, 425 U.S. 564, 587 (1976) (quoting Rogers v. Richmond, 365 U.S. 534, 541 (1961)).

The function of Edwards is to protect the "initial election" of an accused to seek the assistance of counsel, Patterson v. Illinois, 487 U.S. at 291, in his or her dealings with the police. Once a charging decision has been made, the officer conducting an interrogation has an even greater incentive to overcome that "initial election" in order to make the accused "the deluded instrument of his own conviction." Estelle v. Smith, 451 U.S. at 463.

Lowell Green was formally charged with murder on January 4, 1990, the day before he was interrogated, when the

United States Attorney filed a complaint in the Superior Court alleging that Green had committed a first degree murder.[10] See Moore v. Illinois, 434 U.S. 220, 228 (1977) (per curiam) ("The prosecution in this case was commenced under Illinois law when the victim's complaint was filed in court"). The filing of the complaint signalled a change from the investigative to the accusatory stage. The person named in a complaint is a "defendant," Sup. Ct. R. Cr. P. 4(c), 5(a). Like an indictment or information, a complaint is

[10] This Court declined to decide whether the Sixth Amendment right to counsel "attaches" when a complaint is filed in Minnick, 111 S.Ct. at 489, and in Edwards, 451 U.S. at 480 n.7. In this case, the Court of Appeals held, without elaboration, that there was "no issue of violation of defendant's right to counsel under the Sixth Amendment," Pet. App. 3a-4a n.1, and Green has not sought review of that holding. Regardless whether Green also had a Sixth Amendment right to counsel, the fact that a charging decision had been made transformed the interrogation from investigative fact-gathering to pretrial discovery. In the context of a case already slated for prosecution, even an exculpatory statement has significant value to the police.

a charging document which contains "a written statement of the essential facts constituting the offense charged." Rule 3. A complaint, together with the required affidavit, constitutes sufficient authority to hold a person in custody pending a preliminary hearing. Rule 5(d).

In Marrow v. United States, 592 A.2d 1042 (D.C. 1991), the Court of Appeals wrote, "[t]he process of obtaining an arrest warrant - which includes a judge's approval of charges designated by the United States Attorney and the filing of a complaint, supporting affidavit, and warrant in the warrant office ... assures that a decision to charge has been made by the United States Attorney, based upon probable cause, and that it is a matter

of court record." 592 A.2d at 1045.[11]

If so, then it follows once a complaint

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[11] Marrow was decided two weeks after Green. The District of Columbia Court of Appeals held that the filing of a complaint in the Superior Court warrant office completed the charging process so that a person under the age of eighteen who had been charged by complaint with an offense subject to adult criminal prosecution could also be charged as an adult with other offenses otherwise exclusively subject to the jurisdiction of the juvenile court. D.C. Code §§ 16-2301, 16-2307(h). In Marrow, the defendant was arrested for misdemeanor possession of cocaine, an offense normally within the exclusive jurisdiction of the Family Division. Following his arrest, however, the police discovered an outstanding warrant for assault with intent to murder, an offense for which Marrow was subject to prosecution as an adult. Marrow argued that the cocaine possession offense was not "subsequent" to his transfer for criminal prosecution, because he had not been "charged by the United States Attorney," D.C. Code § 16-2301(3), with the assault before committing the misdemeanor.

In Marrow, the government argued successfully that "'[c]harging' may be accomplished by the filing of a complaint." Brief for Appellee at 4, Marrow v. United States, (No. 89-1034) (D.C.). See also id. at 5 ("the court clearly indicated that charging takes place when a complaint is issued"). It pointed out that under D.C. Code § 23-113, the statute of limitations is tolled by the filing of an indictment, or an information, or if "a complaint is filed before a judicial officer empowered to issue an arrest warrant; Provided, that such warrant issued without unreasonable delay...." Id. at 6. Thus, the government treated the filing of a complaint as a "firm commitment" to prosecute. Compare Brief of the United States as Amicus Curiae at 21, Minnick v. Mississippi, (No. 89-6332) (suggesting "firm commitment" to prosecution required for Sixth Amendment).

is filed "the government has committed itself to prosecute, and ... the adverse positions of government and defendant have solidified." Maine v. Moulton, 474 U.S. 159, 170 (1985) (quoting United States v. Gouveia, 467 U.S. 180, 189 (1984)).[12]

The police "circumvented" rather than honored Lowell Green's right to counsel. See Patterson v. Illinois, 487 U.S. at 302 n.2 (referring to Sixth Amendment right). On January 5, 1990 Lowell Green was transferred from the cellblock of the Superior Court building, where he was only steps away from the courtroom and the office responsible for assigning appointed counsel, to the

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[12] This conclusion is buttressed by the terms of the booking order authorizing the police to take custody of Lowell Green. The order was issued, "[u]pon a representation by the United States Attorney's Office that additional charges are to be brought against Lowell Green...." DX 1.

custody of the Metropolitan Police, on the basis of a "booking order" authorizing release "for the purpose of booking, fingerprinting, photographing and processing on a charge alleging a violation of 22 D.C. Code 2401 and at the conclusion thereof to return forthwith to [United States Marshal's] custody." "Booking" is not "part of the investigative effort. Instead it is a form of administrative processing that consists mainly of obtaining information 'required immediately to enable the police to book and arraign the suspect and [to set conditions of release].'" Brief for the United States as Amicus Curiae at 12, Pennsylvania v. Muniz, (No. 89-213). The police did not perform the limited booking procedure authorized by the court; they transported Green to

Homicide for interrogation. It is clear that the interrogation was not envisioned as a preliminary to an initial appearance in court, because the arrest warrant was not actually "returned" as executed until January 6, 1990, when Green was brought back to the courthouse and counsel was appointed for him. The police unfairly exploited the booking order as a license to bolster a prosecution with incriminating admissions while Green could have been making his initial appearance in court.

CONCLUSION

"Preserving the integrity of an accused's choice to communicate with police only through counsel is the essence of Edwards and its progeny ...." Patterson v. Illinois, 487 U.S. at 291. The rationale of Edwards applies with full vigor to these circumstances, because the police did not honor Lowell Green's desire for the assistance of counsel after he made his wishes known. The judgment of the District of Columbia Court of Appeals should be affirmed.

Respectfully submitted,

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